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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 837

JOHN P. KINSEY, individually, and as a director and stockholder of Monroe Paper Products Company, and LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER CO., individually and as stockholders of said Monroe Paper Products Company,

*Petitioners,*

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as directors, officers and stockholders of Monroe Paper Products Company and as Trustees under a Voting Trust Agreement dated December 31, 1953,

*Respondents.*

## PETITIONERS' APPENDIX TO PETITION FOR CERTIORARI

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GEORGE E. BRAND, Jr.,
*Of Counsel.*

## INDEX TO APPENDIX


| | Page |
|---|---|
| OPINIONS IN COURTS BELOW | 2-161 |
| First Appeal: | |
| District Court | 2-116 |
| Court of Appeals | 117-132 |
| Court of Appeals (re costs) | 133-135 |
| Second Appeal: | |
| District Court | 136-148 |
| Court of Appeals | 149-161 |
| STATUTES AND RULES INVOLVED | 162-174 |
| As to the refusal of the Court of Appeals to pass upon the validity of the voting trust | 162-163 |
| Rule 1, F.R.C.P. | 162 |
| Rule 52(a), F.R.C.P. | 162 |
| Rule 54(b), F.R.C.P. | 162 |
| Rule 56(a), (c), (e), F.R.C.P | 162-163 |
| As to validity of the coting trust | 163-175 |
| The Securities Act of 1933 | 163-166 |
| The Securities Exchange Act of 1934 | 166-167 |
| S.E.C. Rule X-10 B-5 | 167-168 |
| Michigan Blue Sky Law | 168-170 |
| Sherman and Clayton Acts | 170-172 |
| Michigan Restraint of Trade-Price Fixing Laws | 172-173 |
| Michigan Restraints On Alienation Law | 173 |
| Michigan Law as to Derivative Actions | 173-174 |
| Michigan Voting Trust Law | 174-175 |

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## PETITIONERS' APPENDIX TO PETITION FOR CERTIORARI

## OPINIONS IN COURTS BELOW

# UNITED STATES DISTRICT COURT
## Eastern District of Michigan
## Southern Division

JOHN P. KINSEY, individually, and as a Director and Stockholder of MONROE PAPER PRODUCTS COMPANY, a Michigan Corporation; LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER COMPANY, a Connecticut Corporation, individually and as Stockholders of said MONROE PAPER PRODUCTS COMPANY,

*Plaintiffs,*

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as Directors and Stockholders of said MONROE PAPER PRODUCTS COMPANY, and as Trustees under Voting Trust Agreement dated as of December 31, 1953, pertaining to stock therein; GEORGE J. HUBER, individually and as Chairman of Stockholders' Committee of MONROE PAPER PRODUCTS COMPANY stock, and said MONROE PAPER PRODUCTS COMPANY,

*Defendants.*

Civil Action 13179

**FINDINGS OF FACT AND CONCLUSIONS OF LAW IN RE PARTIAL FINAL JUDGMENT IN ACCORDANCE WITH RULE 54(b)**

(Decided and filed August 4, 1955, by Honorable Arthur F. Lederle, Chief Judge, not published)

(As corrected August 5, 1955)

## FINDINGS OF FACT

1. Plantiffs, John P. Kinsey and Lawrence G. Kunkel, are citizens of the State of Connecticut; Waterbury Corrugated Container Company is a Connecticut Corporation.

Defendant Monroe Paper Products Company, hereinafter referred to as Monroe, is a Michigan Corporation, with its place of business located at Monroe, Michigan.

The Defendants Knapp, Raney, Blum, Leathers and Sempliner are citizens of Michigan; Members of the Board of Directors and Voting Trustees of Monroe; Defendant Huber is a citizen of Michigan and Chairman of the Stockholders' Committee which promoted the Voting Trust Program.

The matter in controversy exceeds the sum and value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

2. This is a derivative action brought for the benefit of all Stockholders to recover funds of Monroe illegally diverted to their own use by the Defendant Directors, in violation of their fiduciary duties as Directors, and for damages sustained by Monroe because of the violation of such fiduciary duties.

It is alleged that in carrying out their unlawful conspiracy to defraud Monroe, the Defendants violated the Federal Securities Act, Mail Fraud Statutes, Anti-Trust Laws, the Michigan Securities Act and the General Corporation Act.

In addition to the ordinary relief sought in an action of this kind, Plaintiffs seek an Injunction restraining the Defendant Voting Trustees from exercising any of the rights which they claim to have acquired by virtue of the Voting Trust Agreements entered into between them and some of the Stockholders.

The Plaintiffs further seek private damages because of the alleged violations of the State and Federal Anti-Trust Laws.

One of the Attorneys of Record, Hugh Francis, purporting to act on behalf of the Corporation, filed an Answer and Cross-Claim.

The Defendants Knapp, Raney, Blum, Leathers, and

Sempliner filed a Cross-Claim seeking damages for alleged violation of the Federal Anti-Trust Laws.

It has been agreed that the Defendant Directors are entitled to a jury trial, which they demanded, on the issue of damages arising out of the alleged violation of the Anti-Trust Laws. To facilitate the trial of these issues, it has been further agreed that a separate trial should be granted as to that portion of the controversy which must be submitted to a jury.

3. The difficulty that Plaintiffs' attorneys have had in securing evidence, particularly relating to the accounting features of this controversy is related in detail in another finding. As the Plaintiffs' attorneys have secured new information, they have found it necessary to file Amended and Supplemental Complaints. The latest Amended and Supplemental Complaint was filed on May 13, 1955. The individual Defendants' Answer to this Amended and Supplemental Complaint was filed May 31, 1955 This pleading included a Demand for a Trial by Jury.

4. Plaintiffs have established that the Corporation has sustained substantial loss and damage because of the breach of their fiduciary duties by the Individual Director Defendants. The quick assets of the Corporation decreased from $725,811.66 on June 30, 1953, to $345,042.38 on June 30, 1954. It appears likely, therefore, that additional funds will be needed very soon to keep the plant in a competitive condition.

There are also compelling reasons why the Plaintiffs' prayer for a permanent injunction should be granted at once. Federal Procedure Rule 54 (b) is particularly appropriate for a situation disclosed by this complicated litigation.

It is obvious that a further investigation will be required before a complete judgment can be entered as to all of the loss and damages sustained by the Corporation. A partial judgment for damages should be entered at this time.

These findings will relate to the matter of the entry of a final judgment as to the prayer for a permanent Injunction and to the items of loss and damage as specifically

set forth herein. The Court will retain jurisdiction as to all claims not specifically referred to in the judgment.

5. In accordance with the usual practice, all parties have been requested to file requested or proposed Findings of Fact and Conclusions of Law. Plaintiffs' attorneys have filed voluminous requests. There is no substantial conflict as to the evidence supporting many of these requested findings. All of the remaining requested findings are supported by a preponderance of the evidence. It is the view of the Court that many of these requested findings are not essential to a decision of the question as to the right of the Plaintiffs for a permanent Injunction or for the partial money judgment. It may be that it will be determined that they are all essential before the Court makes its final determination and complete adjudication of this case. Only such portion of the Plaintiffs' requested findings are included in the Court's findings as are deemed essential for the adjudication of the claims involved in this portion of the case.

6. The authorized and outstanding Capital Stock of Monroe on June 7, 1941, was 212,150 shares of Common Stock, having a stated par value of One Dollar ($1.00). In accordance with the established policy of Monroe, from time to time, either by virtue of a resolution adopted by the Stockholders, or by resolutions of ratification, stock of Monroe was purchased and retired, so that on August 1, 1952, the total outstanding stock was reduced to 190,000 shares. Since August 1, 1952, 3,329 shares have been acquired by Monroe and are held by it in the treasury, leaving 186,671 shares held by the public. On December 15, 1952, Monroe had 549 stockholders residing in various parts of the United States.

7. Since 1944, Monroe's fiscal year has ended on June 30. The By-Laws provide that the Annual Meeting of the Stockholders shall be held in September of each year. Because of the pendency of this action, at the request of counsel, the Court entered an Order postponing the 1954 meeting until the further order of the Court. On the Court's own motion, this Order was set aside May 4, 1955.

The By-Laws also provide for a Board of eight Directors, to be elected at the Annual Meeting by a cumulative voting method.

8. Monroe was organized as a Michigan Corporation in 1920. Its principal business is the manufacture and sale of corrugated fiber boxes. It became involved in financial difficulties and a State Court Receiver was appointed to manage its affairs on August 22, 1932. Alex J. Groesbeck, a former Governor of Michigan, A. W. Sempliner, father of Defendant Sempliner, and Oliver J. Golden represented Monroe in this litigation.

At a meeting of the Directors held October 22, 1934, after the receivership was terminated, six thousand (6000) shares of Treasury Stock were transferred to Groesbeck, two thousand (2000) shares to Sempliner and two thousand (2000) shares to Golden as a final settlement for the legal services rendered. Soon thereafter, Groesbeck was elected President and Golden and Sempliner, Directors. Since about 1940, Groesbeck operated Monroe substantially as if he were the sole proprietor. During this period he avoided giving the Stockholders much information as to the operation of the Company. His control was such that he dictated the policy as to the declaration of dividends. By various means, he was successful in preventing any outside interests from securing substantial amounts of Monroe stock. The stock was not listed on any exchange and Groesbeck, in effect, fixed its market price. At the date of his death, March 10, 1953, he held 32,814 shares. When a Stockholder desired to sell his stock, there was no market except through Monroe or Monroe's bank. Groesbeck insisted that none of the employees or others associated with Monroe could purchase such stock without first communicating with him. From time to time he permitted a number of his close associates to acquire stock. At the time of his death, March 10, 1953, he and his associates controlled in excess of 40,000 shares.

9. At the date of Groesbeck's death, March 10, 1953, the remaining Directors were Defendants Knapp, Raney, Blum, and Leathers, who will hereinafter be referred to as the Monroe Directors and Hugo Krave, Harry Grant and

Charles E. Feinberg, who will hereinafter be referred to as the Detroit Directors.

Aside from the organization meetings held immediately after the Annual Stockholders' Meetings, very few formal Directors' meetings were held. The Minute Book discloses that Directors' meetings were held on the following dates, commencing with 1940:

| Year | Date of Meeting(s) |
|---|---|
| 1940 | March 12 |
| | June 27 |
| | November 8 |
| | November 28 |
| 1941 | June 7 |
| | December 5 |
| 1942 | December 21 |
| 1943 | December 6 |
| 1944 | October 4 |
| | November 28 |
| 1945 | February 15 |
| | April 6 |
| | July 18 |
| 1946 | February 9 |
| 1947 | None |
| 1948 | None |
| 1949 | September 27 |
| 1950 | April 11 |
| | September 27 |
| | October 4 |
| | October 11 |
| 1951 | April 11 |
| | September 26 |
| | November 6 |
| 1952 | September 25 |
| 1953 | None held prior to Groesbeck's death. |

When it became necessary to have the records disclose an action of the Board of Directors, such as a Declaration of Dividends, Groesbeck prepared a document labeled "Waiver and Consent" and had the Directors sign it. It is Feinberg's claim that before entering such orders,

Groesbeck consulted with some or all of the Detroit Directors and with Margaret Simmons, an attorney associated with Groesbeck in the practice of law. There is no evidence that Groesbeck consulted with any of the Monroe Directors, except Raney, in connection with the preparation of such documents.

During the war years and the period immediately thereafter, there was a great demand for the Company's products in this community and, because of this demand, the average selling price of the product increased from $59.03 a ton in 1940 to $155.42 a ton in 1951. The quick assets that the Corporation had on June 30, 1953, resulted from the conservative dividend policy carried out by Groesbeck. The fact is that during this period very little money was expended for capital improvements.

10. Defendant Raney, a Monroe resident, was employed by Monroe in 1934. In 1940 Groesbeck selected him as General Manager and Vice President. Raney has spent practically all of his working life in the paper business and hence is familiar with it. During Groesbeck's life, the relationship between him and Raney was that of employer and employee. Groesbeck gave the orders and Raney executed them.

Raney had charge of purchasing, manufacturing and selling for the Company. While he was operating directly under the supervision of Groesbeck, who assumed the entire responsibility for the financial and general business policies, the Company operated fairly successfully.

After Groesbeck's death, Raney, who had no experience in handling financial affairs, assumed complete responsibility for the operation of the plant and seldom consulted with the other Directors. There is no evidence that any of the other Directors exerted any influence on the management of the Company.

Knapp, a Monroe resident, is a retired farmer, 72 years of age. He has had no training in business affairs and does not claim to understand Monroe's records. He has owned 375 shares of stock from the date of the Company's organization. At the trial he testified that he had no responsibility other than to act as Chairman of the Stockholders' and

Directors' meetings. There is no evidence that he performed any other duties for Monroe.

Blum, a Monroe resident, has been employed by Monroe since it was organized. He has also held a small amount of stock since that time. There is no evidence that as a Director, he ever exercised his independent judgment with regard to Monroe affairs. He suffered a heart attack in 1948, and sought to be relieved from testifying at a pretrial deposition because it would endanger his health. A doctor's certificate supporting this claim was filed. For many years he has acted as Secretary-Treasurer of Monroe. He has never received any compensation for this service in addition to the compensation he received as an employee. He has no special qualifications nor has he had special training for this important position.

Leathers, a Monroe resident, has been a Director since October 18, 1937. He is also a Director of a competing paper company and the *Monroe State Savings Bank*. There is no evidence that he ever took an active interest in the operation of Monroe, or that he had any influence on its policies during Groesbeck's regime.

Sempliner, a resident of Grosse Pointe, Michigan was elected a Director of Monroe at the Annual Meeting of the Stockholders on September 23, 1953. He owns 300 shares of Monroe stock and his Mother owns approximately 7,203 shares. Sempliner testified that he did not know prior to his nomination by Francis at the Annual Meeting that he was to be a candidate for Director. As a witness, Sempliner refused to concede that in his position as a Director of Monroe he had any responsibility to aid the plaintiffs in recovering funds or property of Monroe that had been missappropriated. He was a leader in the efforts to persuade representatives of the Securities and Exchange Commission not to institute injunctive proceedings.

Huber has resided in Monroe all of his life. The site upon which the Monroe plant is located was formerly owned by members of his family. He formerly owned some stock in Monroe which he sold about 1938. About 1948, at Groesbeck's suggestion, he purchased 375 shares.

Since 1939 Huber has held an appointive position with the State of Michigan. During Groesbeck's life, Huber as-

sisted him in conducting Annual Meetings by making or seconding motions in accordance with Groesbeck's directions.

He actively participated in the campaign to prevent outside interests from purchasing stock and in promoting the Voting Trust arrangement. He permitted his name to be used for the purpose of giving color to the claim that the Defendants were attempting to protect the interests of Stockholders residing in the vicinity of Monroe. In April, 1954, he contributed $75 to the Committee which was organized by the Defendant Directors to act as a front for the Voting Trust Program. As late as April, 1954, he attempted to induce Vogel, referred to hereafter, to purchase a large block of Monroe stock, approximately 50,000 shares, at the inflated price of Fifteen Dollars ($15.00) per share. He did not concede that he was then acting on behalf of the Defendant Directors.

Although his facsimile signature was attached to the Voting Trust letter of December 31, 1953, he did not draft the letter or authorize the use of his signature and does not consider himself responsible for any misrepresentations in it. There is no evidence that he received directly for his personal benefit any of Monroe's funds, but he engaged in this enterprise in the hope that he would profit from it. Since the commencement of this suit, he has not assisted the Plaintiff's attorneys in their attempts to protect the Corporation or its Stockholders.

11. Most of the Company's banking business was conducted through the Monroe State Savings Bank, hereinafter referred to as the Bank. For many years the average of the non-interest bearing demand deposits of Monroe in the Bank was $300,000. The J. D. Cook and Leo Boudinet hereinafter referred to are, respectively, the President and Vice President of the Bank. They actively cooperated with the Defendants in the Proxy Campaign, Escrow Arrangement and Voting Trust Program.

The Bank was a Monroe Stockholder of Record, acting in a fiduciary capacity. Both Cook and Boudinet were familiar with the affairs of the Company.

12. For many years prior to 1942, the Monroe law firm of Golden and Griffen acted as attorneys for Monroe on a retainer basis. After Golden's death, Thomas E. Griffen continued to take care of the Company's legal business on a fee basis. Groesbeck and Raney fixed the amount of these fees.

The Company had very little litigation. Raney could not recall any court case other than the Woodall matter which is referred to in the record. There is no evidence to indicate that Griffen's services were not performed in a satisfactory manner or that he was not competent to conduct any legal business that the Company might have.

On Sunday, August 2, 1953, Griffen met Raney and offered to shake hands with him. Raney told him: "I never want to see you again; I don't want to have anything to do with you; you sold out * * * and I will have nothing to do with you."

When Raney accused Griffen of "selling out", he did not mean that Griffen was being unfair to the Monroe Stockholders; he did mean that Griffen was unwilling to assist him in his plan to gain control of the Company so that he might retain his lucrative connection with it.

The Griffen deposition of April 9, 1954, discloses one of the reasons why the Court deemed it advisable to discontinue the attempt to secure evidence by discovery Depositions, and have an early trial. It also discloses the extent to which Groesbeck dominated the affairs of the Company during his regime. Only a small portion of this Deposition relates to matters which concern the Corporation. It discloses the interest Francis has in this case and the methods used by him in obstructing the efforts of Messrs. Brand to secure evidence necessary to protect the interests of the Corporation.

No adequate reason has been shown for discharging Griffen who had rendered faithful service to the Company and understood its affairs. Griffen had complete charge of the so-called Woodall litigation. After Raney discharged him, contrary to the best interests of the Corporation, an effort was made to have other attorneys substituted as attorneys for Monroe. Griffen refused to consent to a substitution until satisfactory arrangements were made for the

payment of his fees. Prior to this occurrence the parties had always been able to agree as to fees.

13. For many years Francis had been associated in the practice of law with Groesbeck. In 1951 he purchased some Monroe stock from him. After August 2, 1953, Knapp and Raney consulted with Francis in connection with their own personal plan to retain control of the Company. Up to the present time, he has cooperated very closely with the Defendants and they have followed his directions. He stated in open court, he represented "management." By "management", he meant the Defendant Directors. Prior to the August 25, 1953, Board meeting, he gave Raney an oral opinion later confirmed in writing, that as General Manager, Raney had power to do anything that the Company's Board of Directors had power to ratify. Raney knew that he could always depend on the approval of the other Defendant Directors and, therefore, continued to conduct the affairs of the Company as if he were the sole proprietor.

14. Groesbeck died intestate. Proceedings for the probate of his estate were instituted in the Probate Court for Wayne County; Krave and Simmons were appointed and qualified as Administrators. Groesbeck's heirs were his brothers, Louis and Clarence, and his sister, Adele Groesbeck. He left a substantial estate, in addition to the 32,814½ shares of stock of Monroe. On April 10, 1953, Joseph A Monynihan, Jr., of Detroit entered his appearance in the probate proceedings as attorney for the sister.

15. Raney did not call a meeting of the Directors to fill the vacancy caused by Groesbeck's death, but immediately started in collaboration with Huber to devise means whereby he could get control of the Company and continue his lucrative connection with it.

16. Huber arranged a dinner party, to which he invited Fred W. Kaess, with whom he had formerly been associated in his State employment. The exact date of this party has not been fixed, but it is apparent that it occurred prior to Raney's conference with Moynihan, referred to in other findings. On this occasion Huber and Raney sought Kaess's

help. He suggested that they consult with Moynihan. Kaess testified that he referred them to Moynihan for the purpose of securing financial aid. Huber testified that he understood Kaess referred them to Moynihan as a competent attorney qualified to handle corporation matters.

17. Raney followed Kaess's advice and early in June communicated with Moynihan. He told Moynihan that Sempliner desired to be a Director, but for some undisclosed reason at that time, Raney did not approve of Sempliner. He requested that Moynihan consent to be a Director. After some consideration, Moynihan decided to accept the appointment, thinking that he could thereby better represent his client, Adele Groesbeck.

Raney informed Moynihan that he would have to have fifty shares of Monroe stock in order to qualify as a Director. Moynihan placed an order with a Detroit broker, but was unable to obtain any stock. He reported this fact to Raney who informed him not to worry about that and said that he would get the fifty shares, at about $7.00 per share. At this time, Moynihan informed Raney that until the stock was distributed to the heirs, the Administrators had control of it. Raney informed Moynihan that he was not anxious to have the Administrators sell the Monroe stock. He informed Moynihan that the Detroit Directors wanted to have Simmons elected as a Director, and Krave as President, but in view, it was desirable to have a Monroe man as President. Moynihan had met Knapp, Leathers and Blum, and had confidence in the Monroe Directors. He asserted, however, that he would vote independently if he were elected a Director. On June 15, 1953, a certificate for fifty shares, standing in the name of and endorsed by one Jack Hattner, was reissued to Moynihan. Moynihan assumed that this was Raney's stock, but up to the date that he testified, he had not paid for it. Dividends declared subsequent to June 15, 1953, on this stock have been paid to Moynihan.

18. After Raney had received Moynihan's assurance that he would accept a position as Director, he called a meeting on June 24, 1953. Although there was a quorum

present on June 24, none of the Detroit Directors appeared. This meeting was adjourned until June 26, 1953, at which time all of the Directors were present. Raney had telephoned Simmons not to appear at the meeting in order to avoid embarrassment to her.

The Detroit Directors sought to have Krave elected as President, and Simmons as Director. This was opposed by the Monroe Directors. Thereupon, the Detroit Directors joined in voting for Moynihan. Feinberg referred to Knapp's lack of qualifications for the position of President. There was nothing said about Knapp receiving any compensation other than the fees allowed by the By-Laws, nor was there any discussion about any additional duties for Knapp.

Moynihan knew about Raney and Huber and some of the other Directors' desires to acquire enough stock to keep control of the company, but at no time did Raney or the other Defendants ask Moynihan to become a part of their group, or join in their efforts to acquire stock of the Company. He also knew that Feinberg and Krave, particularly, were dissatisfied with the results of the June 26 meeting.

19. Raney told Moynihan of his desire to purchase the Louis Groesbeck stock at $7.00 per share. Moynihan visited Monroe on July 17, 1953, and assisted Knapp in the preparation of Knapp's letter of that date to the Stockholders. On July 20, 1953, Raney and Huber called on Moynihan at his Detroit office. Moynihan suggested that they consult with Harold Love, an attorney, who was a friend of his. Huber testified that the purpose of consulting with Love was to get legal advice. Love and Moynihan testified that the purpose was to see if some of Love's clients would be interested in purchasing Monroe stock. Moynihan testified that Kaess may have suggested that they see Love. Huber further testified that Love suggested a Voting Trust Arrangement. Love could not recall this part of the conversation, and Moynihan did not suggest a Voting Trust.

20. Moynihan knew about the dispute between the Monroe and Detroit Directors as to the form of proxy to

be used at the Annual Stockholders' meeting. The matter was referred to Moynihan and Krave for solution. At this time Moynihan understood that the proxy form would provide for the election of all of the Directors, including himself.

Moynihan then consulted with the Klein law firm, which is referred to in other findings. The form prepared by the Detroit firm was approved at the Directors' meeting of August 25, 1953, over the objection of the Detroit Directors. The proxy form distributed to the Stockholders with the proxies stated that the preference in voting would be given to Knapp, Leathers, Raney, Blum, Moynihan, Krave, Grant, and Feinberg in that order. At this meeting, Moynihan made the motion to approve Knapp's letter of July 17 and July 30. He also presented to the Board a proxy form limiting the proxies to Knapp, Raney, Blum and Leathers, which form of notice was adopted over the objection of the Detroit Directors.

Krave, at the next meeting of the Board, held August 29, when Moynihan was not present, characterized this form of notice as "* * * an obvious attempt to hide from the Stockholders the facts as they have been discussed in this and previous Directors' meetings * * *. It is an obvious attempt to gang up on the three Directors not named on the proxy." Krave suggested that the names of Knapp, Krave, Raney and Grant be placed on the proxy, with a blank space left for the Stockholders or any other person as a proxy. His suggestion was not adopted.

Moynihan left on a vacation on August 26, 1953, and did not return until September 7th or 8th. He delivered the Articles of Incorporation and Minute Book, which he had previously delivered to the Detroit law firm, to Francis on August 26, 1953. He received a relayed telegraphic notice in Colorado of the Directors' meeting of August 29, 1953. He communicated with Raney by telephone, and Raney agreed that it would not be necessary for him to attend this Directors' meeting.

The National Container offer to buy stock in the Company was announced by the Monroe attorney for the Groesbeck estate on September 2, 1953, and the proxy campaign

was under way when Moynihan returned from his vacation.

21. Moynihan apparently mindful of the old adage about the lawyer acting as his own attorney, requested Stoetzer, of the Detroit law firm of Clark, Klein, Brucker & Waples, to advise him as to forms of notice as to the Annual Meeting and the form of proxy to use in connection therewith. Shortly thereafter, he asked Stoetzer's advice as to cumulative voting. Subsequently, he, Knapp, Raney, Blum and Leathers also had a conference with Stoetzer. Moynihan delivered to Stoetzer a draft of a proxy form which Director Krave prepared naming Knapp, Raney, Krave and Grant as those to whom the proxy was to run. Later the Defendants consulted with George H. Klein, the senior member of this firm, with reference to their individual problems. Except for the fact that another lawyer connected with the firm was present at some of the conferences, there is no evidence that any other member of the firm had anything to do with this matter or even had any knowledge that the Defendants were clients of the firm.

Both Stoetzer and Klein knew that a disagreement existed between the clients they represented and the other Directors. No one connected with this law firm had anything to do with the proxy letter signed by Knapp, dated September 5, 1953. They did not prepare the proxy statement that was a part of that letter.

Stoetzer knew that a meeting of the Boad was to be held August 25, 1953, to consider plans for the Annual Meeting. He went to the Monroe office of the Company and had a conference with Knapp, Raney, Leathers, Blum and Moynihan. He did not disclose his presence to Krave, Feinberg or Grant; nor did any member of his firm at any time confer with these Directors. He remained to learn about the outcome of the Meeting and thereafter had conferences with Raney and Moynihan as to the proxy campaigns that were then current.

The result of the Stockholders' Meeting was reported to the Klein firm. On October 1, 1953, Stoetzer sent a letter congratulating Knapp, Raney, Blum and Leathers on their

success in electing a majority of the Directors and extended his best wishes for the continued progress of the Company under their direction. With this letter he enclosed the firm's invoice for $475 for legal services. Knapp, well knowing that the firm was retained to represent the Defendants and not the Company, on October 23, 1953, paid the bill with his personal check. On November 10, 1953, the Company bookkeeper telephoned the Klein firm, requesting that another invoice charging the service to the Company be sent to the Company office. The Klein firm complied with this request and sent another invoice dated October 1, 1953, addressed to Raney's attention, and wrote that upon the receipt of the payment by the Company, the firm would issue its check to Knapp in reimbursement for his personal payment. Upon Raney's direction, the Company's check was made out to the law firm and Knapp in turn received a check from the Klein firm. Raney, as well as Knapp, knew that the legal services furnished by the firm were solely for the benefit of themselves, Blum and Leathers. They wanted this assistance to aid them in retaining their control of the Company for their personal benefit. If at any time either Knapp or Raney thought that this was a Company obligation, there was no reason why Knapp should not have been reimbursed directly by the Company. The matter of the employment of the Detroit firm and the payment for their services was never presented to the Board of Directors and the Board never authorized such employment or such payments.

The only possible explanation for having the Detroit firm submit a duplicate invoice and make the refund to Knapp was to conceal this transaction from the other Directors and the Stockholders. In their attempts to trace this transaction, Plaintiff's attorneys sought to secure the invoices involved. Not getting them from the Company's records, Stoetzer was sworn as a witness. Ford, acting on behalf of the Defendants as Voting Trustees, waived the privilege of attorney and client. The Court ruled that no such privilege was available if it could be considered that the service rendered was for the benefit of the Company. Stoetzer took every precaution to make sure that he did

not disclose any confidential information. When the Court overruled the claim of privilege, he testified fully and frankly and disclosed the contents of the firm's file. In this manner the Plaintiff's attorneys secured the copies of the two invoices.

22. The petition of the Groesbeck Administrators for "License to Sell" the Groesbeck stock was set for hearing in the State Court on September 9, 1953. Moynihan requested the Court to delay a decision for a short time, but filed no objection to the sale of the stock at $10.00 per share, and the license was granted. His curiosity was aroused because the Administrators had not sought a license to sell other Groesbeck stock, and no attempt was made to sell the Monroe stock until after the June 26, 1953, meeting, when the Detroit Directors were unsuccessful in electing Krave and Simmons.

23. Aside from the matter specifically referred to herein, there is no evidence that Moynihan had any information about the ulterior purposes of the Defendants in their attempt to secure control of the Company. He apparently agreed that $10 per share was a good price for the Groesbeck stock, but saw no reason why he should not seek re-election as a Director. Before the Stockholders' Meeting began on September 23, 1953, Raney informed him that Sempliner controlled over 7,000 shares and was "very desirous of going on the Board, and that Sempliner, and not Moynihan, would be nominated and elected." This was the first information that Moynihan had received that he was not going to be re-elected. To use his expression, he knew he was "licked."

As matters developed at the Annual Meeting, the Defendants needed the vote of the Sempliner stock to control the election. Moynihan testified that he had no conversation with Sempliner at this meeting. However, Sempliner testified as follows: "* * * when I was elected Director and he was not, I said, 'I'm sorry, but I have substantial interests here, greater than yours, I'm sorry that I had to replace you'."

Thereafter, Moynihan had no contact with any of the Defendants in connection with Monroe matters, except as

to the fifty shares of stock heretofore referred to. While a Director, he took no active part in dictating the Company's policies, made no study of the plant operations, and did not analyze the Company bookkeeping system or audit reports. He did not examine the annual Balance Sheets of June 30, 1952, and June 30, 1953. Raney told him about the Lloyd-Thomas appraisal, and he understood its purpose was to ascertain the value of the stock.

Moynihan received a check for $60.00 for the September Board meeting, at which time he was not a Director and did not attend. At the time he considered this as compensation for the trouble that he had been put to in attending the Stockholders' meeting when the Defendants knew he was not to be re-elected.

During the early part of his testimony, Moynihan indicated that he thought that the stock transferred to him on the books of the Company belonged to Raney, and since he had converted it into a Voting Trust certificate and signed a signature card in January, 1954, he thought that he had discharged his obligations to Raney. Later, he concluded that he still owed Raney for the stock, and intended to pay him for it.

If this stock was owned by the Company, Raney had no right to transfer it to Moynihan. If the stock was not owned by the Company, but was available for purchase, at $7.00 per share, it was Raney's duty to purchase it for the Company.

24. At the meeting held June 26, 1953, the Directors voted to pay Raney a bonus of $5,000.00 and Blum $500.00. This was at a time when they did not know whether the preceding year's operations of the Company had been successful or unsuccessful. At the same meeting, they voted to pay Raney $2,000.00 for expenses alleged to have been incurred by him while he was in Groesbeck's company the preceding winter in Florida. Both items were included in a lump sum of $7,000.00.

They also voted to pay the Groesbeck Estate, $7,500.00 and Simmons $2,500.00. The records do not disclose what services were rendered to justify these two payments. Krave, as representative of the Groesbeck Estate, and Moy-

nihan, as representative of one of the Groesbeck heirs, refrained from voting in this matter.

25. For many years it was the policy of the Stockholders and Directors of Monroe to use the portion of the income charged to the Depreciation Reserve to reduce the amount of outstanding stock by purchase of shares for the treasury and retirement. Resolutions of the Directors or the Stockholders authorizing or approving such purchases were adopted. At the Annual Meeting of the Stockholders held in September, 1952, they voted to retire approximately 10,000 shares of previously purchased stock then in the treasury that the Company purchased at approximately $5.23 per share and authorized the purchase of an additional 10,000 shares for retirement. Prior to July 1, 1953, 3,329 shares were purchased in accordance with this resolution. Since July 1, 1953, the Defendant Directors have made no effort to purchase stock for Monroe but have purchased any available for themselves or have diverted it to their associates.

26. After the meeting of June 26, 1953, Feinberg decided to dispose of his stock. He knew that because the stock was not listed and because the Company was relatively small, that no prudent investor would purchase the stock unless he was assured of competent management. The only way to have this assurance was to have enough stock to control the Company. Therefore, he set out to purchase more stock on his own account and induce other Stockholders to join him in his attempt to acquire more than a majority of the stock.

During July he was friendly with both Sempliner and Francis. He assumed that because they knew that the real value of the stock did not exceed $10 per share, they would willingly join with him in his attempts to dispose of their holdings. He knew that Krave and Simmons, who controlled the Groesbeck stock, would join him.

In order to facilitate the program, he made escrow arrangements with the National Bank of Detroit. It was arranged that the stock would be deposited with the bank, and the bank would distribute the proceeds. He did not

anticipate that he would have much difficulty in securing a sufficient number of shares of stock to carry out this program at a price of $10 per share because the stock was then selling for about $7.50 per share.

27. Feinberg authorized Vogel & Co., Detroit stock brokers, to purchase stock for him. On July 15, 1953, Vogel wrote a letter to Monroe stockholders offering to purchase their stock. This Vogel letter came to the attention of Raney who discussed it with Knapp, Blum and Leathers. They realized that the Detroit group would not have to secure much stock to add to their holdings to give the purchaser the control of the Company. They knew they were not financially able to purchase all of the stock that might be available. In order to discourage the stockholders from selling, they started a campaign to convince the stockholders that the stock was worth more than the price then being offered. In collaboration with Raney, Blum and Moynihan, Knapp prepared and sent the following letter to the Stockholders, on the Company's letterhead, and at the Company's expense.

"Monroe, Michigan
July 17, 1953

"To Our Stockholders:

"It has come to the writer's attention that a stock broker in Detroit has mailed a letter to our stockholders. The purpose of the stock broker's letter is to obtain your reaction to a proposition of selling your stock in this Company.

"For your information, a minority group of stockholders is attempting to purchase stock for the purpose of taking over control of your Company. If this minority group is successful in purchasing sufficient number of additional shares, the result will be that they will elect their own Board of Directors who, in turn, will elect their own officers at the Annual Meeting in September.

"Prior to offering your stock for sale at this time, we respectfully request that you contact the writer or either one of the following Officers: Mr. Chas. E.

Raney, Vice-President and General Manager or Mr. G. A. Blum, Secretary-Treasurer.

"Very truly yours,
Monroe Paper Products Company
/s/ Burton S. Knapp
Burton S. Knapp, President"

The "minority group" which Knapp had in mind were the Detroit Directors and their associates.

28. On July 30, 1953, the following letter, written on the letterhead of Monroe, and prepared and mailed at Monroe's expense, was sent to all of the Stockholders:

"Monroe, Michigan
July 30, 1953

"To Our Stockholders:

"As you know, it has been our policy in the past to declare four dividends per year and we expect to pay these quarterly dividends in the future during September, December, March and June.

"We are pleased to announce that the Board of Directors has declared a dividend of fifteen cents (15c) per share, payable on September 15, 1953, to all shareholders of record September 1st, 1953, and to call your attention to the fact that this dividend represents an increase of fifty percent (50%) over the dividend paid September 15th., 1952.

"We believe that 1953 will be a fine year for Monroe Paper Products Company.

"Very truly yours,
Monroe Paper Products Company
/s/ Burton S. Knapp
Burton S. Knapp, President"

At a Board meeting held August 18, 1953, the propriety of sending these letters was discussed. Feinberg and Grant disclaimed any responsibility for the communications. Leathers felt that the then Directors should keep any outside concern from taking over control, and offered a resolution approving of these letters. This resolution was adopted by vote of Raney, Leathers, Blum and Moynihan, over the objections of Krave, Feinberg and Grant. At the time that the letter was sent declaring it to be the policy

of the Company to pay a regular dividend of sixty cents (60c) they knew, or should have known, that if the plant was to be properly maintained, the earnings of the Company would not justify such a dividend. They had no reliable information that would justify the prophecy that the then current fiscal year would be a fine year. The Moss report of June 30, 1954, disclosed the Net Profit Before Income Taxes for that year as $193,712.88, as compared with $449,485.27 for the preceding year.

29. In one of the "Waiver-Consent" documents, dated March 18, 1948, referred to in a prior Finding, Raney was authorized to secure a valuation appraisal in the following language:

"We do further authorize, empower and direct the Vice-President and General Manager, Charles E. Raney, to sign a contract with the Lloyd-Thomas Company of Chicago, Illinois, for appraisal of this Company's property, to cover valuation of buildings together with their appurtenances, such as: plumbing, lighting, heating, permanent fixtures, machinery—major and minor, equipment, furniture, and other fixed assets; but not to include value of land, stock, goods, supplies, good will, nor other intangibles, the foregoing contract fee estimated at four thousand dollars ($4,000.00) to four thousand five-hundred dollars ($4,-500.00)."

Subsequently, Groesbeck changed his mind and ordered Raney not to proceed. It will be noted that the authorization was for a valuation appraisal and not an insurance appraisal. Subsequent suggestions from Raney and Knapp that they secure an insurance appraisal were disapproved by Groesbeck. Leo L. Reihmer, a salesman for the Lloyd-Thomas Company, called upon Raney on August 4 and discussed with him the value of such an appraisal for fixing the amount of the insurance the Company should carry and for adjustment in case of loss. Without discussing it with any other Director of the Company, and without the approval or any new authorization of the Board of Directors, Raney signed the contract for such an appraisal. He agreed with Reihmer that the fee should not exceed $4,-500.00 for the service. In order to estimate the amount of

time required to make the report and the fee to be charged, Reihmer walked around the plant for an hour or two. Prior to the time that the contract was signed, there was no discussion as to the market value of the property. As Reihmer was leaving, Raney asked what the valuation would be for insurance purposes. Reihmer examined a report made in 1932. After studying it for a short time, his estimate was around $4,000,000.00. He later testified that he had no qualifications as a valuation expert, but was merely a salesman.

At this time, Raney knew more about the value of the plant and equipment than any other individual. On frequent occasions he had called attention to the fact that in many particulars it was obsolete and in need of rehabilitation. The Lloyd-Thomas report consists of listings of the Company's machinery and other equipment, which was made by some of their employees and sent to their home office in Chicago, where the pricing was carried out by other employees who had not seen the plant or equipment. It was not intended to be used for establishing the value of the equipment that Monroe owned, but was based upon the amount it would cost to replace such equipment, with modern equipment intended to perform the same function. The Lloyd-Thomas report was not received until January 4, 1954.

Raney wanted this appraisal for propaganda purposes and he could not wait until it was completed; so he requested a written memorandum be sent to him from the company. Reihmer transmitted this request by telephone to the company's Vice-President. A letter, dated August 10, 1953, was written to Raney by a Vice-President of the company as follows:

"In accordance with your instructions, our engineer, Mr. L. Reihmer, has made an inspection of your plant. He is of the opinion the replacement value of the plant, machinery, and equipment; exclusive of Inventories and Supplies, is in the neighborhood of $4,000,000.00.

"Just before we finish the field work of the current appraisal, which will be started before August 20th, we will write you again with reference to any revised estimate."

The Reihmer estimate was secured for the purpose of carrying out the conspiracy herein involved to discourage small Stockholders from disposing of their stock. The expenditures involved cannot be justified by the 1948 authorization. The use of the propaganda material based on the Reihmer estimate was never approved by Feinberg, Grant, or Krave. Feinberg, Grant, and Kinsey objected to the payment of the Lloyd-Thomas bill, but over their protest the Defendant Directors ordered it paid. The Corporation is entitled to be reimbursed for this expenditure.

30. On September 2, 1953, Griffen wrote a letter to all of the Stockholders reading as follows:

"September 2, 1953

"To all Stockholders
of Monroe Paper Products Company
Monroe, Michigan

"Dear Stockholder:

"The writer is the representative in Monroe of the estate of Governor Alex J. Groesbeck. The governor, as you know, was president of Monroe Paper Products since 1935 and was greatly responsible for the growth and success of this corporation since that time. His estate is faced with the necessity of liquidating the Governor's stockholdings. Certain other business associates of the Governor in Detroit, who also invested in this Company at the solicitation of the Governor; want to sell their stock along with the Governor's interests. These interests collectively represent approximately 40% of all the stock of Monroe Paper Products. In our endeavor to dispose of this stock, we thought it only fair to all stockholders of Monroe Paper Products Company to get for them the same price and the same conditions for sale as we get for this large block. We received some offers from other corporations to buy only 51% of the stock and we refused all of these offers.

"We now have an offer from the National Container Corporation, one of the largest producers of paperboard in the country. Their offer, briefly, is as follows:

"(a) They will pay $10.00 net per share in cash to the stockholder.

"(b) You, as the present stockholder, will retain the dividend to be paid by the Company on September 15, 1953, in the amount of fifteen cents per share.

"(c) National Container will buy 95% to 100% of the stock if that amount is obtained by us by September 21, 1953.

"(d) If we do not produce by the above date that amount of shares, they are bound to buy if we produce 55.6% of the stock.

"(e) If between September 21, 1953, and October 30, 1953, we are able to obtain the difference between 55.6% and 95% of the total shares, they will be the same price per share as for the first group. If they do not get the entire balance as above specified by October 30, 1953, they will not buy the same, but will only keep the 55.6% of stock.

"(f) All expenses connected with the sale are to be paid by National Container, so your total net per share would be $10.15 which includes the dividend to be paid by the Company.

"The actual handling of your stock certificate will be as set forth in the enclosed option and you will retain your stock until notified by me to deposit the same with the First National Bank of Monroe, Michigan, for checking by a representative of the National Container Corporation.

"The First National Bank of Monroe is acting solely as a depositary for the National Container Corporation funds and as a depositary for the individual stockholders who deposit their stock with the Bank. *The Bank has no interest in any way in the entire matter, other than simply acting as a depositary as above stated.*

"If you prefer not to sign the option, you may forthwith deposit your stock with the First National Bank, properly executed, and they will give you a receipt for the stock . *In no event shall your stock certifi-*

*cate be delivered to National Container without first being paid by the Bank for your stock,* no matter which procedure you follow. We will require a few days after your stock has been deposited to examine the stock certificates to see that they are properly executed and determine the percentage on deposit. As soon as that is ascertained, the payments will be made.

"If we obtain options for and/or have deposited in the First National Bank, either 55.6% of the stock or 95% of the stock, by September 21, 1953, properly executed by the Stockholders, National Container is bound by contract to buy the stock at the price indicated. If such block of stock is obtained and when you are paid for your stock by the First National Bank, you will then sign an irrevocable proxy appointing me your proxy to vote your stock. If less than 55.6% is obtained by September 21, 1953, National Container is not obligated to buy the stock and your stock certificate will be returned to you.

"If the second block is obtained as above specified, the purchase of the stock will be handled in the same manner as the first block.

"In short, therefore, the first 55.6% of the outstanding stock will be purchased and I urge you to get your stock in to the Bank as quickly as possible, or sign the option and return it to me in order that you may be within the 55.6% group.

"As you well know, Monroe Paper Products stock is an unlisted stock and in the past had practically no market for the sale of it. In other words, it is very difficult to liquidate the stock and difficult to borrow on it. The offer herein made by National Container is approximately 25 to 40% higher than this stock has ever sold for in at least the last fifteen years.

"I personally believe, and so do the executors of the Groesbeck Estate, that this is a marvelous opportunity for the stockholders of this Company to liquidate their stock at a good profit. No one, of course, would pay this high a price for the stock in this Company, as National Container has offered to pay unless they desired to operate the Company.

"National Container Corporation has assured me that all present personnel of Monroe Paper Products will be retained and that the general manager will be offered a contract.

"If you care to check with your banker or whomever advises you on investments, I am sure that they will agree that this is a great opportunity for the stockholders. They can also help you with the details of forwarding the certificates or option. Again I urge you to act promptly in order that all of us may take advantage of this splendid opportunity. If there are any further details that you want on this, please contact me.

"Very truly yours,
/s/ Thomas E. Griffin
Thomas E. Griffen"

TEG:VN
Enc.

On September 2, 3, and 4, 1953, Knapp, Raney and Blum published an advertisement in The Monroe Evening News reading as follows:

TO MONROE PAPER PRODUCTS
COMPANY STOCKHOLDERS

It has come to the attention of management that a local attorney is soliciting the purchase of Monroe Paper Products Company stock.

For your best interests, we are hereby advising you that management is in no way connected with the solicitation and statements being made by this local attorney.

THE MANAGEMENT OF MONROE PAPER PRODUCTS COMPANY
Burton S. Knapp, President
Chas. E. Raney, Vice-President and General Manager
G. A. Blum, Secretary-Treasurer

On September 4, 1953, the Monroe Evening News published an article containing the substance of the Griffin letter.

31. Knapp, with the assistance of Francis and Raney prepared a combined letter and Proxy statement which he sent to all the Stockholders, reading as follows:

September 5th, 1953

TO ALL SHAREHOLDERS: Of Monroe Paper Products Company:

Enclosed is a condensed balance sheet and a summary of profit and loss of your company for the fiscal year ending the 30th day of June, 1953, also a proxy statement and a proxy form for use at the annual meeting of shareholders of the corporation to be held on September 23, 1953.

The death of our President, the Honorable Alex J. Groesbeck, was a loss to stockholders and a great personal loss to your officers and directors who worked with him for many years. His assistance, counsel and guidance have been very helpful in the financing of the company during the depression in the early 30's and the continued growth of your company. An appropriate resolution was adopted by your Board of Directors and delivered to his family.

Your Board of Directors, by appropriate action, elected the undersigned your President. Mr. Charles E. Raney, who has been General Manager of your company since 1940, continued as Vice President and General Manager.

As your new President, I consider it desirable to present to stockholders the progress made by your company since 1940. I believe many stockholders are not fully aware of this progress.

In 1940, the cash position of the company was hazardous, with less than $5,000.00 on hand and the company had a substantial outstanding indebtedness. Your company now has no debts except current obligations and the current reports reflect the strong cash position with a total of $695,261.66 in bank deposits alone.

Progress is reflected by the book value of your company's stock. The book value in the year 1940 was $4.12 and this book value has increased each year. You will note from the enclosed report that the

present book value of the stock is $10.32. *Competent appraisers have advised that the replacement cost in building and machinery, exclusive of inventory, is greatly in excess of the present book value.* No dividends were paid in the year 1940 and stockholders are aware of the history of dividends since that date. During the time of the payment of these dividends, the company has continued to make improvements and add to its surplus. These improvements have been paid for, for the most part, out of earnings. In excess of One and one-half Million Dollars has been expended for capital improvements since the year 1940 and it is the belief of your President that your company, in addition to having a sound financial structure, is well equipped to meet competition in the industry.

In 1940, the company had 212,150 shares of capital stock issued and outstanding. Pursuant to resolutions of your Board of Directors, your company has retired stock from time to time so that the number of shares outstanding, as reflected by the enclosed condensed balance sheet, is 186,671 shares. Of course, the smaller the number of shares issued and outstanding, the greater the value of each share held by the present stockholder.

Stockholders attending the annual meeting in person, have a right to ask any pertinent question concerning the conduct of the company's business.

/s/ Burton S. Knapp
President

PROXY STATEMENT

The enclosed proxy is solicited by management for use at the annual meeting of stockholders of Monroe Paper Products Company, a Michigan Corporation, to be held on September 23, 1953. The sending of this proxy has been approved by an affirmative vote by your Board of Directors. You may, if you should so desire, revoke the proxy at any time before it shall have been taken into account or voted, by giving notice to the company, in writing, or by your appearance at the meeting.

The only known business to be transacted at the shareholder's meeting consists of the following:

(1) The election of eight directors to serve for one year and until their successors are elected and qualified.

(2) Consideration of the reports to be laid before the meeting.

If other matters are lawfully brought before the meeting, it is the intention of the persons named in the enclosed form of proxy to vote such proxy in accordance with their judgment in such matters.

The company history of the persons named in the proxy is as follows:

Burton S. Knapp (President) has been a director continuously since March 1, 1936.

Chas. E. Raney (Vice-Pres. & Gen. Mgr.) has been a director, Vice-President and General Manager continuously since March 31, 1941.

G. A. Blum (Sec.-Treas.) has been a director continuously since March 1, 1936. He was one of the original incorporators.

D. B. Leathers has been a director continuously since October 18, 1937.

The company history of the remaining directors is as follows:

Harry S. Grant has been a director continuously since 1937.

Charles E. Feinberg has been a director continuously since 1949.

Hugo Krave has been a director continuously since 1949.

Joseph A. Moynihan, Jr. has been a director continuously since June 26, 1953.

It is the intention of the persons named in the proxy to vote for the re-election of all the above named directors, provided they are nominated and are willing to serve and the vote is unanimous or sufficient favorable votes are available to insure the re-election of the entire board. In the event it appears all the present board cannot be re-elected from the vote of stockholders present, in person and by

proxy, then it is the intention to vote as necessary to assure as far as possible the re-election of individual directors in the following consecutive order: Burton S. Knapp, Don B. Leathers, Charles E. Raney, George A. Blum, Joseph A. Monynihan, Jr., Hugo Krave, Harry S. Grant, and Charles E. Feinberg.

The close of business, August 19th, 1953, has been fixed as the record date for the determination of stockholders entitled to vote.

To assure a quorum for the transaction of business, you are requested to fill in, sign and date the enclosed proxy and mail or deliver promptly.

Dated: September 5th, 1953

By order of the Board of Directors.

/s/ G. A. Blum
Secretary

/s/ Burton S. Knapp
President

This communication was prepared and paid for at Company expense. The proxy form enclosed was the one that was approved over the protests of Feinberg, Grant and Krave.

The letter contains many false and misleading statements. It represents the type of activity that Congress sought to eliminate among larger corporations by adoption of the Securities Act of 1934.

32. William J. Weipert, herein referred to as Weipert, whose name appears often in the record, is a Monroe resident engaged in the practice of law with his brother under the firm name of Weipert and Weipert. He and his brother own a small amount of Monroe stock. They also represent an estate which has some stock. On September 9, 1953, he conferred with Huber with reference to the formation of a Stockholders' Committee. He knew that Griffen and those associated with him were attempting to persuade other Stockholders to sell their stock so that, with the Groesbeck stock, the proposed purchaser, The National Container Corporation, would secure the majority control of the Company. He had personal knowledge of the false and misleading character of Knapp's proxy letter

of September 5. He assisted Knapp, Raney and others in the preparation of other false and misleading communications that he knew were to be transmitted to the Stockholders.

He selected himself as Chairman of the Committee and Weipert and Weipert as attorneys for the Committee and secured the consent of other Stockholders to permit their names to be used as Committee members by telephone. Huber was also listed as a member of this Committee. Weipert had lengthy telephone conferences with Francis and Moynihan, conferences with Knapp and Raney and discussed with Raney the advisability of buying options. This activity consumed substantially all of his working time September 9, 10 and 11. September 11 he published an advertisement in the Monroe Paper reading in part as follows:

> (1) The Groesbeck estate was reported to inventory cash holdings in the sum of approximately $250,000.00 and the records disclose marketable assets in the estate which could be sold.
>
> (2) Regardless of the foregoing, an apparent reason for the proposed option to purchase Company stock, in the opinion of the undersigned committee, is the attempt of the minority group of stockholders to liquidate their stock and deliver the controlling interest of your Company. 55.6% would elect five members of an eight man Board of Directors.
>
> (3) The undersigned committee has examined a letter from competent appraisal engineers which disclose that the replacement value of the Company's buildings, machinery, equipment, auto trucks and trailers (but exclusive of lands, inventories, supplies, receivables, intangibles and liabilities) is approximately Five Million Dollars. While replacement value of course is not a final criterion for market price, simple long division shows this to be over $26.00 per share.
>
> (4) Your attention is called to the memorandum in re exclusive option to purchase stock sent to stockholders which provides in Paragraph 2 that T. E. Griffin shall be irrevocably designated as the proxy

to vote said stock at any time and at all meetings of the stockholders as he shall see fit and which proxy shall revoke all prior proxies. You will note that there is no limitation in this statement as to voting the proxy at future meetings and it states that stockholders giving the proxy cannot revoke the same.

In the opinion of attorneys who have analyzed the option form (written opinion is available), it is so drawn that stockholders might possibly lose their vote in important company elections, even though National Container should be released from their alleged commitment to purchase for failure to meet the required percentage.

(5) It has been reported to the undersigned committee that one of the administrators of the Groesbeck estate who is also a director of your Company but whose name is not signed to the administrator's communication sent to stockholders, namely, Hugo Krave, who was disappointed in his efforts to become President of your Company and to elect his co-administrator a director. This same individual voted, as a director, against the form of proxy statement showing the progress of the Company and the President's statement which were sent to stockholders. Charles E. Feinberg and H. S. Grant as directors also joined Hugo Krave in opposition.

(6) You will note that the communication sent you by T. E. Griffin, the attorney, soliciting an option on your stock, provides that all expenses connected with the sale are to be paid by the National Container Corporation.

(7) The option proposal sent to stockholders was placed as an advertisement in a local newspaper and is preceded by a statement to the effect that the attorney soliciting options from stockholders represents three directors (unnamed) of Monroe Paper Products Company as well as the Groesbeck estate, and goes on to state that the proposed sale is for the best interest of all since those with the greatest interests and long knowledge of the company believe it to be a sound transaction. None of these three Directors re-

ferred to is in the management proxy statement sent to stockholders. Stockholders can draw their own conclusions as to whether the three directors represented by Mr. Griffin (Messrs. Krave, Feinberg, and Grant), or the four directors named in the management proxy (Burton S. Knapp, President; Chas. E. Raney, Vice-President and General Manager; G. A. Blum, Secretary-Treasurer; and D. B. Leathers), have the longest and soundest knowledge of the Company's business.

The undersigned committee is of the opinion that stockholders have not been fully advised, in the past, of the progress made by their Company and of the facts upon which they could properly appraise the actual value of their stock. Any stockholder desiring further information may write or phone the undersigned attorneys for the undersigned stockholders' committee."

This advertisement was republished in the same newspaper on September 14, 1953, together with the following additions:

"Any stockholder who has not already done so is urged to send the management proxy to the company, unless certain of attending the annual meeting on September 23, 1953. (Attendance will revoke an earlier proxy.)

"'By joint action the value of our stock will be revealed, preserved and enhanced, and outside control prevented."

Weipert kept his time records on a printed form. Plaintiffs' attorneys were successful in securing the records attached hereto. It will be noted that they were not successful in securing the records for the period from October 16, 1953 to November 30, 1953. This form was intended to be used for an individual client and Weipert referred to Monroe Paper Products Company, as the client. Although Monroe Paper Products Company was listed as the client, the entries indicate that most of his activities related to the private interests of the individual Defendants.

At one time he attempted to unscramble this record by the use of a code; "X" denoting services in connec-

tion with the Escrow Agreement, "C" denoting services for Monroe, and "S" denoting services for the Stockholder's Committee. At the time that he was engaged in drafting the Escrow Agreement, Cook thought he was representing the Bank. He attended the Annual Meeting and after conferring with Raney, Knapp, and Blum took care of the newspaper publicity concerning this meeting.

In order to make it appear that he was working for Monroe so that he could be paid with Monroe funds, Raney agreed with Francis that Weipert should act as Francis' Monroe associate.

During the period covered by these findings, Weipert has acted in so many capacities that it was sometimes impossible for him to decide which client he was representing on various occasions. During the Pre-trial, Deposition hearings and the Trial, Weipert was a difficult witness to examine. It is impossible to reconcile some of his testimony with his records. He testified that he considered his employment by Monroe as terminated about October 23, 1953. Documentary evidence discloses that he presumed to act as an attorney for Monroe as late as April, 1954.

Contrary to prior practice, Weipert kept no significant time records subsequent to the commencement of this suit, other than intermittent entries on a calendar pad ultimately destroyed. His reason for keeping no records was: "From then on I was practically full-time engaged, for a long period of time in the defense of this case * * *." "At a later time, I sent statements to the Voting Trustees which, to some extent, reflect my time * * *."

The use of Monroe funds to pay Weipert for using his talents and time against its interests was not justified.

33. Raney realized that many people who are familar with the affairs of Monroe would agree with Griffen that the $10.00 per share was a good offer and knew that many of them were depositing their stock for sale at that price. He therefore decided to establish an escrow arrangement similar to Griffen's at the Monroe Bank. On September 9, 1953, he talked to Cook.

Cook consulted with Weipert, who acted as attorney for the Bank from time to time, and directed him to prepare

an escrow agreement that would protect the Bank. Cook understood that Weipert was performing this service for the Bank, but up to the date that his deposition was taken, Weipert had not submitted a bill for this service nor had payment been made. Raney deposited $15,000.00 toward the escrow account before the agreement was formulated. His check was held until the agreement was entered into and then deposited in the account. The escrow committee consisted of three employees of the Company. Leathers also deposited $15,000.00 in this account. Other small sums were supplied by employees of the Company. So much stock was offered for sale at the rate of $10 per share that the escrow funds were soon used up. Raney thereupon started to exert pressure upon parties who were doing business with the Company to compel them to contribute sums to the fund.

The methods used by Raney to induce parties who had business relations with the Company to contribute to this account was illustrated by the experience of Dan S. Holefca, a pension expert who had been employed by Raney in 1952 as a consultant.

About the middle or end of July, 1953, Raney stated his thought to Holefca that a group would have to raise money to keep the Groesbeck stock from getting into unfriendly hands and he asked Holefca whether he would be willing to join in doing so. Raney suggested that Holefca purchase $10,000.00 worth of stock in the Company. Holefca tried to dodge, and delayed answering. About a month later, when the campaign against the National Container offer was on, Holefca, against his broker's advice, decided to follow Raney's suggestion by investing $5,000.00 in the stock. His reasons for doing so were that he could see "business advantage"; that he was informed the Company had a large cash balance; and that Raney anticipated the Company would consider repurchase of outstanding stock and, if it did so, Holfeca would have an opportunity to sell if he so desired. Raney also stated that a regular dividend rate had been established by the Directors. Prior to putting up the $5,000.00, Holefca knew that the voting rights of his stock, and of others joining in such purchases of stock, would be controlled by Trustees who had not yet

been selected. He understood that his $5,000.00 and other funds, would be escrowed for use in purchasing stock, "to gather the voting rights of stock held by people who were favorably inclined toward the existing management." He gave permission to have the stock so purchased by him voted by the Company officers so as to retain control of the Company. With this understanding, he placed in Raney's hands $5,000.00 which was deposited with the escrow depository on September 11, 1953, and for which 500 shares of stock were issued to members of Holefca's family and thereafter deposited under the Voting Trust Agreement.

In September, 1953, Raney induced Alvin Sandroff, a resident of Illinois, who controls the Thomas Paper Company of Chicago to contribute $25,000.00 to this Escrow fund. Apparently Sandroff, like Holefca, considered that he would gain a business advantage by making this contribution. The records of the purchases and the inventory disclose that he did reap such a business advantage.

34. The principal raw material used by Monroe is waste paper of varying types. The cost of the waste paper accounts for approximately forty per cent of the cost of the finished product. There is a marked variation in the prices paid for various types of waste paper. In June, 1953, the Company paid $42.54 per ton for kraft; $21.16 for old corrugated; $13.50 for mixes and $16.60 for news.

A substantial part of the current assets of the Company consists of inventory. Experience in the business world has demonstrated that if the parties in charge desire to do so they can adjust the profit and loss account to suit their purposes by adjusting the inventory. The waste paper inventory of June, 1953, in the amount of $261,179.45 has not been questioned. It may be that this was reasonably accurate for it was taken before the conspiracy referred to herein progressed very far. The 1954 annual report fixed the value of the inventory at $502,235.57. Much of this inventory was stored outdoors where it is subject to deterioration. On the basis of the valuation set forth in the annual report, it will be noted that the June, 1954, inventory, as a whole, was 91 per cent over the 1953 in-

ventory. This situation was brought about partially by an increase over the 1953 purchases, and partially by the decrease in sales and shipments. This is of special significance because of the relation between Raney, who made the purchases, and Sandroff, who dominated and controlled the Thomas Paper Products Company, one of the principal suppliers. Reference is made in another finding to the assistance rendered to the Defendants by Sandroff in their attempts to secure and retain the control of the Company. It is also significant that although the total inventory increased only 91 per cent, the increase of kraft, the highest price paper, and old corrugated, the next highest price, increased 622 and 227 per cent, respectively, according to the Company's inventory; the inventory of the two lower price papers decreased, mixed 31 per cent, and news, 53 per cent.

In the waste paper business, it is relatively easy to upgrade supplies. Unless the purchaser's inspectors are particularly alert, it is possible for an unscrupulous supplier. to invoice waste paper in a higher classification than it deserves. Because of this possibility to cheat the purchaser, it is important that the character and the reputation of the supplier be carefully considered. The Court records disclosing felony convictions demonstrate that Sandroff was not ignorant of this method of reaping a quick profit for himself.

Of course, it follows that excessive purchases of expensive waste paper can be concealed by using an excessive amount of a more expensive paper in the manufacture of roll stock. It is also possible to use the excess purchases of genuine kraft by producing more of the higher price rolls used for liners than is needed to meet the demands of the Company. The inventory of the rolls for liner manufacture in 1954 increased 303 per cent over that manufactured in 1953.

At Raney's insistence, the 1954 waste paper inventory included all materials on hand except one lot of fire damaged paper stock, regardless of deterioration or usability. An independent inventory, taken at the same time the Company took its inventory, but excluding all materials deteriorated or not usable, disclosed that the total tonnage

of waste paper was 35 per cent less that that hown in the previous inventory. This inventory disclosed that there was 37 per cent less kraft and 33 per cent less corrugated than that as shown by the Company inventory. As of December, 1954, the stock which was considered usable in June had deteriorated 20 per cent in value; this decrease in value was due to improper storage, contamination, and weathering, and the fact that quantities in excess of the requirements were purchased.

During the first quarter of the Monroe Company's fiscal year, 1954, Sandroff supplied only 147 tons of kraft, which was 17.6 per cent of the total of 835 tons delivered to Monroe in that period by all suppliers. On September 14, 1953, Sandroff delivered to Raney a check for $25,000.00 for the purchase of stock by him, through the escrow arrangement heretofore referred to. During the second quarter, receipts of kraft from Sandroff increased to 669 tons, which was 73.6 per cent of the total of 909 tons of kraft delivered in that period by all suppliers. Except for about two tons, none of the kraft thus supplied by Sandroff in the first two quarters was found to be substandard. During December, 1953, the Company also received 49 tons of chip wraps from Sandroff. The total price of all shipments by Sandroff to Monroe for the first quarter was $7,051.04 (average $2,350.34 a month); and for the second quarter it was $33,441.59 (average $11,147.19 a month), not including the 49 tons of chip wraps; as to which the Monroe cost records show no price, but for which the vouchers show Monroe paid $10.00 per ton, plus freight of from $5.68 to $8.10 per ton.

During the third quarter (January-March, 1954) Monroe received from Sandroff 724 tons of kraft, which was 75 per cent of the total 968 tons received from all suppliers.

Monroe also received from Sandroff 120 tons of old corrugated in the form of substandard kraft, and 458 tons of mixed and chip wraps. The total price of all shipments by Sandroff to Monroe during the third quarter was $47,866.14 (average $15,962.04 a month), exclusive of some freight paid by Monroe on downgraded items. On March 5, 1954, Sandroff sent Raney the 1,297 shares of stock pur-

chased through the escrow arrangements for deposit under the Voting Trust agreement. On March 10, 1954, such deposit was made, and a Voting Trust Certificate for the shares was issued to Sandroff. From March to June, 1954, Sandroff furnished $45,000 to a Monroe broker, selected by Raney, who purchased therewith, for Sandroff, 2888½ shares of stock and Voting Trust Certificates from Stockholders whose names appeared on lists furnished by Raney, or who were referred to the broker by the employees of Monroe.

During the fourth quarter (April-June, 1954) Monroe received 1,117 tons of kraft from Sandroff, which was 69 per cent of the total of 1,603 tons received from all suppliers. In addition Monroe received from Sandroff 396 tons of old corrugated in the form of substandard kraft and 59 tons of mixed. The total price of all shipments by Sandroff to Monroe during the fourth quarter was $64,-537.07 (average $21,512.38 a month). The receipts of kraft and of substandard materials from Sandroff have continued. From July 1, 1954, to November 19, 1954 (end of the cost records made available during this trial), a total of 885 tons of kraft and 347 tons of old corrugated were received, at a total price to the Company of $52,174.01.

The kraft received by Monroe from Sandroff in July, 1953, appears on Monroe's cost records at $45 per ton, but was paid for at the rate of $50 per ton, Sandroff received $50 per ton, F.O.B. Monroe, for all of the 2,657 tons of kraft furnished from July 1, 1953, to June 30, 1954, as well as for the 885 tons furnished thereafter to November 19, 1954. From July, 1953, to November, 1954, the prices per ton paid by Monroe to all of its other suppliers of kraft were: July, 1953, $40-45; August, $45; September, $45-50; October, $45-50; November, $40-43.80; December, $43.80; January, 1954,-April, 1954, $43.80; May, 1954-October, 1954, $35-43.80. At these prices, suppliers other than Sandroff furnished Monroe a total of 1,665 tons of kraft during the fiscal year 1954, which was about 72 per cent of Monroe's total kraft receipts for its preceding fiscal year. In 1954, additional kraft tonnage was offered to Monroe by suppliers other than Sandroff, at prices lower than that of Sandroff, but such offers were not accepted

by Raney. Even had Monroe's 1954 kraft requirements been as high as 1953, only 654 tons of kraft in excess of that delivered by other suppliers would have been so required. It appears to be obvious that the suppliers who were offering kraft at lower prices than Sandroff, could have met all the needs for the fiscal 1954. During this period, however, Raney purchased from Sandroff 2,657 tons for the fiscal year 1954, and 885 additional tons from July, 1954 to November, 1954. The Sandroff purchases were excessive, and Raney, in a series of telegrams sent to Sandroff in March, June and July, 1954, clearly recognized them as such.

The total damage suffered by the Company because of these excessive purchases is difficult to measure, but the record is clear that the purchases from Sandroff cost Monroe from six to fifteen dollars more than was paid to other suppliers.

Substandard material accepted from Sandroff as old corrugated was partially paid for as kraft at more than twice its value, partially paid for as at Chicago old corrugated prices, which were $2.00 a ton higher than Detroit prices, plus freight which was over $4.00 per ton higher than Detroit freight, and partially at Detroit prices plus Detroit freight. These excessive purchases from Sandroff caused Monroe to fail to live up to its agreement with Detroit suppliers to take material which it had promised in advance to accept. Some of the 566 tons of chip wraps and mixed received from Sandroff by Monroe were paid for as old corrugated at over $20.00 per ton; some were paid for at $15.00 per ton, and the rest at $10.00 per ton plus freight of $5.68 to $8.01, although the Detroit prices varied from $6.00 to $10.00 per ton plus $3.80 freight.

The Monroe Company's account on Sandroff's books, on January 31, 1953, showed sales of $9,019.10, and $4,019.18 balance still owing and due from Monroe; on June 30, 1953, it showed sales of $35,772.89 and $8,072.71 balance owing by Monroe and still due. Corresponding figures from September 30, 1953, show the sales were $43,279.07, with a balance still due of $2,928.58. This item was fully paid on October 20, 1953, and a new balance was started as

of October 1, 1953. Thereafter the amount of balance unpaid increased monthly from $12,605.46, on October 31, 1953; to $65,475.21 on July 31, 1954. From October 1, 1953, to September 30, 1954, the total sales by Sandroff to Monroe, according to Sandroff's books, were $196,151.30; and the balance still due from Monroe on September 30, 1954, was $18,842.63.

These excessive purchases at excessive prices from Sandroff started at the time Sandroff joined the conspiracy to control Monroe. Supplying any other type of waste paper was an exception, and occurred only at infrequent intervals. All of the transactions between Monroe and Sandroff after July 1, 1953, were handled directly by Raney, except in rare instances no purchase orders were issued, and Monroe was under no legal obligation to accept any of the Sandroff shipments except in so far as Raney had individually obligated the Company to accept such shipments.

The Defendants, officers and Directors, are directly responsible for the losses sustained by Monroe as a result of these transactions between Raney and Sandroff.

Kinsey and Feinberg observed the unbusinesslike manner in which the inventory was handled. They sought an explanation from Knapp and Raney. Knapp made no explanation. Raney did not disclose his relationship to Sandroff and did not report the difficulty he was having with him about excessive purchases and excessive prices charged. The explanations that he did make were intended to be deceiving.

Although the Plaintiffs have established that Monroe has suffered damages in excess of $50,000 because of the overpayments made to the Sandroff Company, and damages resulting from excess purchases of waste paper, it seems evident that the total loss sustained by the Company as a result of these transactions may be considerably higher. For that reason, judgment as to the full amount of this claim will be postponed for further consideration.

35. On September 14, 1953, the Monroe Evening News published another ad to the Stockholders urging them to accept the National offer. On September 15, 1953, Weipert published an ad reading in part as follows:

"Those seeking the option on your stock present a picture of bestowing great benefits to the community. Again we are content to leave with stockholders decision on whether they are motivated by their own personal gain, or by solicitude for the community welfare.

"The true question is as to what is the best deal for stockholders which has brought about the growth of our Company (by forwarding the management proxy or attending the September 23rd annual meeting), or to allow Mr. Griffin to accomplish the purpose of his clients. The response we are receiving from stockholders indicates that they understand that the purpose of the present management is to give them facts, and true values, and that it is worthy of their support."

This advertisement was prepared as a result of a conference between Weipert, Knapp, Raney, Leathers and Francis. Another advertisement was published on September 19, intended to discourage Stockholders from accepting the National offer. All of these advertisements were prepared and published at the expense of Monroe.

36. Although a public stenographer was retained to keep notes of what transpired at the Annual Meeting, these notes were never transcribed. Aside from the minutes contained in the Minute Book, the only substantial account of the Annual Meeting was given by Boudinet.

He described it somewhat vaguely as follows:

The meeting was held, as usual, in the basement of the Masonic Temple. There was about three or four times as many people as normally attend the meetings, probably 125 people. Confusion reigned. In Boudinet's own words:

"I know the meeting was delayed for quite a long time when negotiations were going on. It put me in mind of a political convention * * *."

"I remember Mr. Feinberg being there; I remember Feinberg delivering a speech; I remember Mr. Francis being there. I don't recall Mr. Moynihan; he may have been there."

From his testimony, Boudinet appeared vague as to how or when Sempliner became a nominee for Director, nor

could Boudinet recall whether he voted the 2,000 shares he represented in person or by proxy.

He was not clear as to the type of conferences that were held by the active participants prior to the Annual Meeting itself.

It was apparent from Boudinet's testimony and the Minute Book notes that the Meeting was entirely under the control of the Defendant Directors. It would appear as though Boudinet, who had attended prior meeting was kept in the dark as to what was transpiring until Francis announced the results. In his voting Boudinet did not exercise his independent judgment, but "• • • went along with the recommendation of the group." The Minute Book does not indicate that the Stockholders present were ever informed that Sempliner was to be substituted for Moynihan, but rather that in violation of the promises made to the Stockholders who gave their proxies to Knapp, Raney and Leathers, these proxies were not voted for Moynihan, but for Sempliner.

It is significant that Knapp appointed Sempliner and two employees of the Company to examine and report on the proxies and appointed a Proxy Committee consisting of Francis and another employee, of which Francis was Chairman, to observe.

The Minute Book further indicates that after the tabulation had been completed, Sempliner announced the results of the number of votes cast. The election of Directors followed and the Minute Book records this as follows:

> "The Chair then appointed Mr. Hugh Francis and Mr. Hugo Krave as a committee, for nomination of directors and appointed Mr. Francis, Chairman. Mr. Francis announced that after a review of Mr. Richwine's tabulation, it was agreed that this tabulation disclosed the directors to be elected and there was no further controversy.
>
> "He thereupon nominated as Directors, Burton S. Knapp, Charles E. Raney, G. A. Blum, D. B. Leathers, Hugo Krave, Harry S. Grant, Charles E. Feinberg and Arthur W. Sempliner. Mr. Krave seconded the nominations. There being no other nominations and the computation of votes having been made by Mr.

Richwine, a C.P.A., the Chair declared the elected Directors to be Burton S. Knapp, Charles E. Raney, G. A. Blum, D. B. Leathers, Hugo Krave, Harry S. Grant, Charles E. Feinberg and Arthur W. Sempliner."

There is no written indication in the Minute Book that Sempliner had replaced Moynihan nor the reason why, or how many votes, if any, were cast for Moynihan. Nor was any definite testimony offered as to when or how this change took place. No written tabulations of the Proxy Committee present at the Annual Meeting was available for inspection by the Court.

The Bank is a stockholder in Monroe in a fiduciary capacity, holding 2,000 shares of the Company stock in trust for Defendant Leather's Mother. Defendant Leathers and his sister are the beneficiaries of the Trust upon the death of their mother. Boudinet, without inquiring as to the capabilities or the aims of Sempliner, permitted his nomination and election without objecting, claiming he knew nothing about Moynihan, and did not know why Monynihan was being replaced and did not bother to find out.

Leather's mother was not consulted as to the manner in which her stock would be voted. It is to be noted that the 2,000 shares of stock were later transferred into the Voting Trust by Boudinet at the request and authority of Defendant Leathers. It was significant that again Mrs. Leathers was not consulted about the transaction and Boudinet's only excuse was that "she was in her 80's." It was Boudinet's belief that by transferring the 2,000 shares to the Voting Trust, he would stabilize the management which had been in constant turmoil. Yet, he admitted that he did not know on which side of management Sempliner stood.

37. On September 25 and 26, 1953, the Defendants published an advertisement signed:

"MONROE PAPER PRODUCTS COMPANY
Burton S. Knapp, President
Chas. E. Raney, Vice Pres. & Gen. Mgr.
G. A. Blum, Sec'y-Treas."

reading in part as follows:

"Our thanks are tendered for the loyal support

given Monroe industry in connection with our September 23rd Annual Meeting."

The last paragraph reads:

"The acumen, good sense and community responsibility of stockholders were never more conclusively demonstrated. Your fine support is encouragement and inspiration to labor and management alike. We shall strive to be worthy of it."

Other paragraphs of this ad read:

"By your interest, *a new record for stock representation*, in person or by proxy, was * * * established. Out of 186,671 shares, all but some 2,000 were represented; a record unequaled by corporations of like size anywhere.

"You have set a stirring, and a needed example of community and business responsibility. You have expressed faith in progressive local management, as opposed to out-of-state control."

This advertisement was prepared and paid for with Company funds.

38. On October 6, 1953, Knapp, Raney and Weipert prepared the following letter, which was signed by Knapp, as President and mailed to all of the Stockholders at the expense of the Company, reading as follows:

"TO ALL STOCKHOLDERS OF
MONROE PAPER PRODUCTS COMPANY

"The interest shown by stockholders in the recent annual meeting and in the attempted sale of control of your company to a New York concern was gratifying to your President and to the management of your company. The personal attendance was the best in many years, and the total representation, in person and by proxy, is believed to have set a new record for corporations of like size. Approximately 99 per cent of all outstanding stock was represented, a remarkable total, guaranteeing a truly democratic meeting.

"Statements have appeared in the local press setting forth the results. However, some of our stockholders are not Monroe resident, and because of the

importance of the matters in controversy, I consider it desirable to report the results to all stockholders.

"When the proposed sale of control of your company to a New York concern was first presented, a Monroe attorney claimed to represent a small group of stockholders holding 40 per cent of your company's stock. When the tabulation was made by a certified public accountant, it was disclosed that his group either owned, or had proxies for, 41.4 per cent. It is noteworthy that this represented only a very small increase over the stock which this group claimed it represented before beginning its extensive sell-out campaign. Your management, on the other hand, which had made no claim to control of stock, was represented at the meeting by 53.363 per cent of all outstanding stock.

"Directors, Knapp, Raney, Blum, Leathers, Grant, Krave and Feinberg were re-elected. Provision was made for voting for them in the proxy statement sent by management. Judge Arthur W. Sempliner was elected as a new member of the Board. The Sempliners own 7,500 shares of your company's stock and represent the third largest stockholder interest. Statements have appeared in the press to the effect that our newly elected director was favorable to the group seeking the sale of control of your company. The best denial of this is that he did not join with them in the vote tabulation, and he has personally denied that the interests he represents are pledged to, or affiliated with, those who sought the sale of control of your company. I believe the new director's interest to be a desire for a continued association with the growth of your company and the avoidance of unnecessary controversy. I say this not only from what he has said, but from experience. His father, A. W. Sempliner, now deceased, was largely responsible for your President being placed on the Board of Directors March 1, 1936. I believe were he alive, the recent controversy would never have arisen, under his legal guidance. Such controversies do not help the company's business.

"A director's meeting was held immediately following the stockholders' meeting and all officers connected with management were re-elected, namely, Burton S. Knapp, President, Charles E. Raney, Vice-President, and G. A. Blum, Secretary and Treasurer. The officer management of your company therefore continues the same and Mr. Raney continues as General Manager.

"The directors declared a dividend of 15 cents per share to stockholders of record on the 1st day of December, 1953, payable on the 15th day of December, 1953.

"The management of your company is not concerned with personalities, or face saving statements; it is primarily concerned with the orderly conduct of your company's business, its progressive growth and giving stockholders the information to which they are entitled. With these purposes in mind, your company should continue its progress.

"I again thank the stockholders for their expression of confidence. You have been deluged with literature on the recent controversy, pro and con. In making the final decision, so overwhelmingly that we trust it will end the matter and begin a new chapter in the company's growth and prosperity, you have exercised foresight and acumen. Your support is encouragement to the entire personnel of your company, labor and management alike.

"Respectfully submitted,
/s/ Burton S. Knapp
President"

39. At the Directors' Organization Meeting held after the Annual Meeting, Knapp, Raney and Blum were re-elected to the positions they formerly held and Bennett was elected Assistant Secretary and Treasurer. In the meantime, Raney started to divert funds of the Company to pay obligations of the Defendants, such as advertising bills, printing expenses and attorneys' fees.

40. After it was definitely determined that the National Container purchase was abandoned, Kinsey, through brok-

ers, purchased the Groesbeck Estate stock and that of the Detroit Directors and many of their associates for the Waterbury Company. In this manner Waterbury acquired 40 thousand shares of stock. Kinsey visited Monroe and attended the Directors' meeting of October 13. Feinberg transferred 50 shares of stock to Kinsey. The meeting was reconvened. Grant resigned. Kinsey was elected a Director. There were no other Directors' meetings held until January 27, 1954.

Kinsey attempted to cooperate with his fellow Directors. Neither he nor any of his associates attempted to purchase additional stock for the purpose of securing control of the Company. When he learned about the Voting Trust Program, he assumed the responsibility for instituting this suit for the protection of all of the Stockholders. In instituting this suit he acted in good faith. If he is successful in securing an accounting from the Defendants he will have performed a service to all of the Stockholders. Any money judgment that is entered will be for the benefit of all of the Stockholders and each Stockholder, large or small, will receive his pro rata share. After he learned about the Defendants' designs, he undertook to purchase additional stock. This was done in good faith in an effort to protect the original investment.

41. The By-Laws make no provision for extra compensation for the President or Vice-President. The Sixty Dollar ($60.00) allowance for Directors' fees is extremely liberal in view of the perfunctory nature of the meetings held and the lack of information furnished to the Directors upon which they are expected to base their decisions.

At the organization meeting of the Board of Directors held immediately after the Stockholders' meeting, September 23, 1953, Grant moved that the Directors' fees be increased from $60 to $100 per meeting. He later withdrew this motion and the matter was tabled for further consideration.

At the next meeting held October 13, the matter of increasing the Directors' fees was the first item on the agenda. The minutes of this meeting read in part as follows:

"President Knapp pointed out that Article II, Section 2 of the By-Laws provided that Directors each receive $60 for attending a meeting, and that, therefore, fees could not be changed unless the By-Laws were amended at a Stockholders' meeting, * * *."

Later, during the same meeting, Knapp asked Raney to take the chair, and left the meeting. During the short time Knapp was absent from the meeting, his fellow Directors adopted a motion providing that the President be paid a salary of $300 per month, plus expenses, retroactive to July 1, 1953. Immediately after this motion was adopted, Knapp returned and resumed his duties as Chairman. It apparently did not occur to him that the By-Laws which he thought prohibited the increase in pay to his fellow Directors would be applicable to him, though he has continued to accept the salary without an amendment of the By-Laws.

During the course of the discussion in Knapp's absence, Feinberg addressed Raney as follows:

"Since you proposed Mr. Knapp as President, what qualifications does he have as President of Monroe Paper Products Company, outside of the fact that he is a stockholder of 375 shares?

"Under ordinary circumstances, Mr. Knapp could not have been elected President of the Company. I find it difficult to say he does not merit the salary, but I do not know what his qualifications are as President of the Company."

Raney did not attempt to answer Feinberg's question. Knapp has performed no services that would justify this payment to him. Defendants made no attempt to sustain the burden of establishing that this agreement between the Board and one of the Directors was fair. The Corporation is entitled to a judgment against Knapp for the Company's funds thus diverted to him.

42. At a Board meeting held October 13, 1953, Knapp, Blum, Leathers and Sempliner, over the objections of Feinberg, Krave and Grant, voted to declare an extra dividend of 40 cents a share. At this time, Knapp, Raney, Blum, Leathers and Sempliner did not inform their fellow Direc-

tors about the Escrow Arrangement referred to in another Finding. At this time, it was also apparent that the earnings of the then current fiscal year would not justify the declaration of such an extra dividend. This extra dividend was voted to carry out the scheme of the Defendants to persuade the Stockholders that the stock was worth more than $10.00 a share. It did, in fact, deceive Blum. At a deposition hearing, an effort was made to get him to express his opinion as to the true value of the stock. He then made the observation that it would depend upon how many more 40 cent dividends the Company could declare.

Knapp sent the Stockholders a notice, reading as follows:

"October 14, 1953

"To All Stockholders of
Monroe Paper Products Company:

"Directors of Monroe Paper Products Company, at a meeting held Tuesday, October 13th, 1953, declared a special diivdend of forty cents (40c) per share, to be paid January 15th, 1954, to stockholders of record January 1st, 1954.

"This special dividend of forty cents (40c) is in addition to the fifteen cents (15c) a share to be paid December 15th, 1953, to stockholders of record December 1st, 1953.

"The special forty cent (40c) dividend will be paid from the earned surplus of your company. The Company's certified public accountant, in his annual report of examination dated June 30th, 1953, determined the earned surplus of your company to be in excess of one million dollars ($1,000,000.00).

"Burton S. Knapp
/s/ Burton S. Knapp
President"

These actions in declaring excessive dividends and the comunications in relation thereto, were intended to discourage the Stockholders from selling their stock to outside purchasers, and also to support the false claim that the Monroe Directors were responsible for the Company's success since 1940. These actions were also helpful to the Defendants in carrying out their Voting Trust Arrange-

ment, which will be referred to hereafter. They constitute an important part of the Defendants' conspiracy to retain control of the Company so that they could contiue to deliver the Company's assets to their own private use.

43. On October 20, 1953, Raney discussed with Knapp means whereby they could retain control of the Company and at this time they considered the Voting Trust device. About this time Weipert started to study the possibilities of various means for keeping the control of the Company. Early in November a meeting was held at the Company's office, attended by Huber, Raney, Knapp, Blum, Weipert, and several Company employees. Huber did not understand the technical details of the Voting Trust but understood that the objective was to keep control of the Company. At this time Weipert owned 95 shares of the Company stock and was a beneficiary under the will of a relative who also owned a small number of shares of stock. Huber knew that the Committee would have the use of the Company's offices and other facilities and would be aided by the employees of the Company in carrying out this project.

Weipert thought that a Voting Trust would be difficult to formulate. In November, 1953, he made a draft of a "Contract and Stock Option." This agreement contemplated that they would attempt to get the owners of the majority of the stock in the Company not to sell their stock during a period of one year to anyone other than the optionees or to stockholders who were parties to the agreement and giving the optionees an option to purchase. This p'an was abandoned.

Following a further discussion between Raney, Knapp, Huber, Blum, and others, Raney again consulted Mr. Stoetzer of the Clark-Klein law firm. Huber never communicated with this firm and never authorized them to prepare an opinion. On November 24, 1953, Stoetzer wrote the following inter-office written memorandum stating the objectives of the firm's employment:

FILE MEMO

"RE: Monroe Paper Products Company

"On Friday, November 20, 1953, Charles E. Raney,

Vice-President and General Manager of Monroe Paper Products Company, discussed the following matter with us and requested our opinion.

"He stated that at the annual stockholders' meeting held September 23, 1953, the opposition group produced approximately 77,000 shares out of 186,671 shares, or approximately 42%, and on a compromise the management elected four of its five nominees, while the opposition elected four nominees, the ninth director's post going to Arthur W. Sempliner who controlled a block of stock. Subsequently the 42% block of stock controlled largely by the Groesbeck estate, was sold to Waterbury Corrugated Container Co., of Waterbury, Connecticut, whose nominee replaced one of the original opposition directors.

"The management, representing approximately 54% of the stock according to the results of its proxy solicitation, desires to consolidate its position and that of the majority stockholders by having such stockholders enter into some form of stockholders' deposit arrangement whereby this block of stock can be held together with a view of negotiating the sale of such majority block intact at a favorable price. There is concern that the large minority block of some 42% held by Waterbury might be readily augmented through purchases of another 9% at a price only slightly in excess of the $10 price which was offered to stockholders generally by both the opposition and the management in connection with the recent solicitation of proxies. Mr. Raney feels that the majority block might be sold for from $15 to $18 per share. Our opinion is requested as to what type of stockholders' deposit arrangement might be entered into whereby the deposit by the majority stockholders of their shares might be solicited under an agreement to deposit the shares with a Stockholders' committee with blank assignments attached under an authorization to sell the shares as part of a block if more than 50% of the outstanding shares are deposited at the most favorable price obtainable, but not less than, for example, $15

per share. This Stockholders' committee would also be authorized to raise such funds from its members as may be required so as to have funds available to purchase outright any stock deposited in hardship cases where the stockholder needs the proceeds from the stock sale prior to the completion of negotiations for sale of the block of stock. It was suggested that this purchase be made at a price equal to a bona fide offer that such hardship stockholders may present to the committee. This hardship arrangement, of course, would be for the purpose of keeping the block of stock together. The hardship stock could be held by the committee until the completion of negotiations and then the proceeds distributed pro rata to the committee members who contributed the purchase funds.

"Mr. Raney also had in mind that this solicitation might run over a period of many months and possibly past the date of the next annual meeting and accordingly he wanted to have a proxy for the next annual meeting deposited with the stock in each case, although the primary purpose of the plan is not to solicit such proxies but rather consolidate the majority holdings into a salable block for sale negotiation purposes.

"Consideration was also given to the possibility of a Voting Trust, but it became apparent that again the primary purpose of the proposal was not control as such but rather to have the majority shares deposited irrevocably for a definite period for the purpose of negotiation of a sale of the stock at not less than a certain minimum price.

"In our opinion we are to discuss, comment and advise upon the proposed plan. Apparently it is intended that immediate action be initiated on this proposal and accordingly we are requested to expedite our opinion and have it in the mail before Thanksgiving if possible.

G. L. S."

On November 25, 1953, the firm issued its written opinion signed by George H. Klein and directed to Mr. Charles E. Raney, Vice-President and General Manager, Monroe Paper Products Company, reading as follows:

"We have been advised that at the annual stockholders' meeting of the Monroe Paper Products Company held September 23, 1953, approximately 77,000 out of 186,671 shares, or approximately 42% of the stock, were represented by a group which was not friendly to the management. We are also advised that since that time this block of stock, controlled largely by one estate, was sold to Waterbury Corrugated Container Co., of Waterbury, Connecticut, whose nominee is now on your Board. At the annual meeting approximately 54% of the stock favored the management and was voted in a block, resulting in the continuance of the present management. We are also advised that effort has been made and will continue to be made to acquire additional shares of stock on behalf of the minority interests, giving them actual control as well as working control, and accordingly the management and many of the stockholders friendly to management feel that untimately a sale of the controlling interest in the company will be advisable provided a fair price is obtained for the stock, your thought being that the price should be between $15 and $18 per share, as against the $10 price which was offered to stockholders generally about the time of the annual meeting.

"You have requested our opinion as to what type of stockholders' deposit arrangement might be entered into whereby the deposit by the majority stockholders of their shares might be solicited under an agreement to deposit the shares with a committee accompanied by blank assignments under authorization to sell the controlling interest as a part of a block at the most favorable price obtainable, but not less than say $15 per share. It is contemplated that such agreement provide that the committee be authorized to raise a fund from its members as may be required so as to have funds available to purchase outright any stock coming on the market in hardship cases before negotiations for sale of the control can be effected.

"Generally speaking, the scheme above set forth

and outlined to us is possible of accomplishment. An agreement may be entered into by the stockholders electing to join with the group to accomplish the above purposes. * * *

"There is under Michigan law another alternative which we think is very much better than a simple agreement as above outlined. This is provided for in Section 34 of the General Corporation Laws of Michigan, which provides for voting trusts. Under this provision the shareholders may by agreement in writing deposit shares of capital stock with or transfer the shares of capital stock to any person or persons or corporation for the purpose of vesting in such person the right to vote thereon *or for such other lawful purposes as may be agreed* for any period of time not exceeding ten years *upon terms and conditions stated in such agreement.*

"Assuming that a Voting Trust Agreement is executed by more than 50% of the shares of stock of the company, the following procedure could be adopted: One or more persons could be appointed Voting Trustees with definite instructions set forth in the Voting Trust Agreement, which in your case would provide for a sale of the shares by the Voting Trustees as a block, at a price to be agreed upon by the Voting Trustees, but not less than a minimum set forth in the agreement without the consent of the depositing stockholders. * * * "

The time records of the Clark-Klein law firm listed the Company as its client, and on January 15, 1954, the firm billed the Company $150 for the Raney conferences and other services in connection with the November 25, 1953, opinion. On February 15, 1954, after institution of Plaintiff's action, Raney requested that the firm reissue the November 25, 1953, letter but naming George J. Huber, Chairman Stockholders' Committee as the addressee and that the law firm rebill the charge for its services to the Committee instead of to the Company. The requests were complied with. The revised letter was furnished, as genuine, by Defendants to Plaintiffs, the Securities and Ex-

change Commission and the Court in this case, and the substitution was not discovered until the taking of the testimony of Stoetzer on December 29, 1954.

This Klein opinion is the sole basis upon which the Defendants base their claim that the Voting Trust Agreement arrangements were "reviewed and approved" by Clark, Klein, Brucker & Waples.

Since this suit was instituted some other conferences were held with the members of the Klein Firm, but no member of this firm has any responsibility for the conduct of the Defendants in conection with the Voting Trust Agreement or this case other than outlined herein. No one connected with the firm had anything to do with the Defendants' plans to induce either the SEC or Michigan Securities Commission to refrain from enforcing the law.

Weipert continued to work on the Voting Trust Agreement and a form of Voting Trust Certificate. The final draft was completed between December 21 and 31, 1953. During the period that he was carrying on this work, meetings were held from time to time in the Company's offices; attended by some of the Defendants, Weipert, Huber, and employees of the Company. Huber left Monroe on December 16 and did not return until January 7. In the meantime, Weipert also prepared an instruction sheet and an alternate signature sheet for mail solicitations. He also prepared a letter purporting to come from Huber, as Chairman of a Stockholders' Committee, reading as follows:

> "Many stockholders who supported the Management of your Company in the last Annual Meeting have requested the local directors and other stockholders to consider setting up a Voting Trust in order to protect and safeguard the position of all stockholders in the majority group. (By 'majority group' we mean all who gave proxies to Management at the Annual Meeting last September, thus defeating the sell-out promoters.)
>
> "President Burton S. Knapp, Vice-President and General Manager Chas. E. Raney, Secretary-Treasurer George A. Blum and Directors Don B. Leathers and A. W. Sempliner, in their capacity as stockholders, have agreed to act as Trustees under a Voting Trust

for all stockholders desiring to take advantage of this protection. If over 50% of the stockholders participate in the Voting Trust, the great advantage will be gained of consolidating your present majority standing, making it much more permanent and valuable than it is now.

"You are in a clear majority now. This fact enables you and your fellow stockholders to elect the majority directors, with resultant stability and continuity in management of the Company under sound and progressive leadership. As you know, the directors declared dividends during 1953 totalling 60c per share. A forty cent (40c) per share extra dividend will be payable January 15, 1954. An appraisal of the Company's properties is now completed. The first appraisal in some twenty years, this reveals replacement value to be in excess of $7,000,000.00 and depreciated value of $4,361,166.82, both exclusive of inventories and lands.

"We should all realize, however, that this out-in-the-open Management, dedicated to your best interests, will manage your Company only so long as over 50% of the stock continues in favorable hands, and is actually represented at stockholders' meetings. Only a Voting Trust can insure this.

"Unity among us is needed now, as never before, for these reasons: As you know, an out-of-state group, which we will call the "minority group", recently bought the large Groesbeck holdings, plus the holdings of some Detroit directors and their associates, and now holds about 40% of the stock. The National Container Corporation had earlier tried to obtain control over your Company, through options or proxies, but stockholders rallied to the support of the present Management and defeated this attempt. But although it was defeated, the presence of some 40% of the shares in the hands of the minority group poses a constant threat to your majority status and standing. Even if the minority group does not acquire a single extra share of stock, they might obtain con-

trol at *any* Stockholders' Meeting in which we did not have nearly 100% attendance — because their proxies are concentrated in one group, while ours are widely scattered. Further, if the minority group were to buy the stock holdings of one or two of our large holders, they would come into permanent control of the Company, and the value of your shares might decline, if we were not all unified by a Voting Trust Agreement.

"The large stockholders on the majority's side, and a great number of smaller holders, have approved the idea of a five-year Voting Trust. The effect would be to give a proxy to the present four local directors and Mr. Sempliner, in all of whom we have unbounded confidence. Further, since a real value of our shares lies in their being majority-control shares all of us would agree that the shares of stock themselves, if they were to be sold, during the 5 years, would be sold *only as a block or unit.* This would command the highest price, and every stockholder, large or small, would share equally in it without discrimination. Your Voting Trustees would have power to sell on that basis only, if it became desirable and advisable in the best interests of all during the five years, *at no less than* $15 *per share.*

"In return for depositing your endorsed stock certificates with the Depositary appointed by the Voting Trustees (The Monroe State Savings Bank, Monroe, Michigan) you will receive Voing Trust Certificates. You retain the full right to see such Voting Certificates, to pledge them as collateral for loans, etc., just as you could with your original shares. As a holder of Voting Trust Certificates, you receive all dividends, cash or stock, which may be declared by the Company on the original shares. In addition to retaining all these rights, you acquire a new and valuable contract right: that of being a member of the majority group, and of being assured of retaining that position throughout the duration of the Voting Trust.

"In union there is strength. *To protect your exist-*

*ing majority status, to protect and increase the value and the saleability of your stock, and to guarantee the continuation of sound business policies of the present Management*—these are the important purposes of the Voting Trust Agreement. Necessary flexibility, to meet changing conditions, is assured by provisions for amendment, requiring the consent of a large majority of the depositing stockholders.

"In short, this proposal provides not only a perfect solution for the existing problem, which greatly handicaps the advancement of your Company, but at the same time improves and enhances your investment and that of all the majority stockholders.

"We are fortunate in having enlisted the active support of Messrs. Knapp, Raney, Blum, Leathers and Sempliner. They are in close daily touch with the affairs of the Company; they will serve as Trustees under the proposed Agreement without compensation. Under their guidance, the legal papers have been drawn up by counsel, and agreed to by the Monroe State Savings Bank. You will be contacted further and furnished with any more detailed information you may desire.

"Your valued cooperation is solicited.

"Sincerely yours,

George J. Huber (Facsimile)

"P. S. Sign the Trust Agreement and endorse your stock certificate with the name or names, exactly as typed upon the envelope in which you received the stockholders' letter, etc.

"The Monroe Law firm of Weipert and Weipert, which has prepared the Voting Trust Agreement, may be contacted by your for additional information. Likewise, the Trust Department of the Monroe State Savings Bank, which will receive the endorsed stock certificates to be deposited under the Agreement and will issue the new Trust Certificates, may also be contacted for information."

Huber did not read the letter which bore his facsimile signature prior to the date that it was printed. The print-

ing and mailing was all carried out under the supervision of Weipert. The program finally formulated by Weipert was intended to accomplish two results:

> First, permit the Defendant Directors to keep control of the Company.
>
> Second, to provide a prize-fixing device which would prevent the individual holders of stock from selling, except in a block, at a price greatly in excess of the true value.

It is obviously intended to compel Waterbury to pay an excessive price for such stock in order to protect the large investment already made.

The Voting Trust Agreement was dated December 31, 1953, but was executed between January 1st and 7th, 1954. The parties signatory thereto were defendants Knapp, Raney, Blum, Leathers and Sempliner as the sole Voting Trustees, and the Monroe State Savings Bank as Depository and Agent of the Voting Trustees.

At this time there were not less than 430 stockholders and approximately 60 of them resided in states other than Michigan. The Agreement contemplated issuance of Voting Trust Certificates by the Voting Trustees to the depositors of stock under the Voting Trust Agreement, in the form of the certificates set forth in the Voting Trust Agreement.

Included with the Huber letter sent to the stockholders was a document entitled:

> "STOCKHOLDERS WHO HAVE SIGNED THE TRUST AGREEMENT, PREVIOUS TO THE TIME OF STARTING THE AGREEMENT SIGN-UP CAMPAIGN"

It listed the names of stockholders holding 41,114¼ shares, none of whom had signed the Voting Trust Agreement. Neither the Voting Trust Agreement, the Huber letter nor the enclosed list of alleged signers disclosed the existence, operation and result of the prior escrow arrangement. All but 263 of the 15,738 shares purchased through the escrow arrangement were ultimately deposited under the Voting Trust Agreement, otherwise a majojrity of the outstanding stock in the Company would not have been deposited thereunder.

The Huber letter dated December 31, 1953, and the list of stockholders who had allegedly signed the Voting Trust Agreement enclosed with the letter, were materially fraudulent in that:

(1) They falsely represented that named stockholders had already signed the voting trust agreement and had already subjected their stock holdings, in excess of 41,000 shares, to the voting trust agreement.

(2) They falsely represented that the re-election of the Company management and the defeat of the so-called "sell-out promoters" had been achieved by a rallying of the Company stockholders; they did not disclose that Raney, Blum, Leathers, Company Employees and persons having business dealings with the Company, had, through the operation of the Escrow Arrangement, purchased a large number of shares to secure such result.

(3) They did not disclose the fact that through the Escrow Arrangement Raney, Blum, Leathers, Company employees and persons having business dealings with the Company, had, through the Escrow Arrangement, purchased upwards of 15,000 shares at $10.00 per share, which were intended to be deposited under the Voting Trust Agreement.

(4) They did not disclose the fact that a majority of the persons whose names appeared on the so-called list of signers of the Voting Trust Agreement were those who had made substantial purchase of stock through the Escrow Arrangement.

(5) They did not disclose that Sandroff, Holefca, and others dealing with the Company had made substantial purchases of stock through the Escrow Arrangement and that their shares were to be deposited under the Voting Trust Agreement.

(6) The letter misrepresented the value of the Company's assets and concealed the fact that the appraisal was only an insurance appraisal for insurance purposes.

(7) With respect to the power of the Trustees to

> sell the deposited stock, misrepresented that the Trustees would have the power to sell only on the basis that all deposited stock would be sold as a block or unit and that every stockholder, large or small, would share equally in such sale without discrimination. The Voting Trust Agreement provided that the Trustees had the right to purchase additional stock. The Agreement was devised so that other depositors' stock could be sold while they retained their own.

This Huber letter dated December 31, 1953, and the list of stockholders, hereinbefore referred to were a device, scheme and artifice to defraud; they contained untrue statements of material facts and omitted to state material facts necessary in order to make the statements herein, in the light of the circumstances under which they were made, not misleading; thereby the Voting Trustees, the Depositary under the Voting Trust Agreement and the Chairman and other members of the Stockholders' Committee engaged in a transaction, practice and course of business which would, did and does operate as a fraud and deceit upon those to whom the Voting Trust Certificates were issued or to be issued. This letter and list did not state the number or amount of the securities then subject, or to be subject, to the Voting Trust Agreement in which each of the trustees then had or proposed to acquire a beneficial interest, nor the number or amount of securities of the Monroe Company not then, nor to be subject to the Voting Trust Agreement, in which each trustee then had, or proposed to acquire, an interest and the nature and extent of such interest.

Plaintiffs consulted counsel and, on February 2, 1954, commenced this suit. In the meantime, a letter dated February 1, 1954, addressed to the Monroe Paper Company Stockholders and Voting Trust Certificate Holders, signed by the Voting Trustees by the Trust Officer of the Bank, was mailed to the Stockholders (not including Plaintiffs or Krave or Feinberg), notifying them that the Voting Trust Agreement "is now in full force and effect" and that the Trustee would, for a short time, accept additional signatures and deposits of stock thereunder. In carrying out the

campaign to market the Voting Trust Agreements, the Defendant Directors made extensive use of the company's facilities, funds, and its employees' time. No records were kept from which it can be determined the extent as to the amount of the loss and damage they suffered as to this illegal conduct of the Defendant Directors. Prior to the institution of this suit on February 2, 1954, no funds were assembled or other provisions made for any of the expenses incurred promoting the sale of these Voting Trust Certificates. After this litigation was instituted, some funds were contributed by the individual Defendants, the Company employees, and Huber to pay these expenses.

The Voting Trust Agreement expressly limited to two ways the manner in which a Stockholder could become a party thereto: one, by the Stockholder signing the Agreement or a counterpart thereof and setting opposite his, her or its name the number of shares which the Stockholder agreed forthwith to endorse and deposit under the Agreement, and the other (at the Trustees' election), by the Stockholder depositing certificates of stock for transfer to the Trustees and receiving Voting Trust Certificates in return therefor. The Agreement provided that this latter method would have the same effect as if the Stockholder had signed the Agreement. The Huber letter instructed the Stockholder to do one of two things—bring the Stockholders' stock *directly* to the depositary bank and there sign the Voting Trust Agreement and endorse and deposit the stock and receive a Voting Trust Certificate therefor all at the same time, or sign and mail an enclosed signature sheet (a separate card directing the bank to attach the Stockholder's signature to the Voting Trust Agreement), *together with* the endorsed stock certificate. The Stockholder was further instructed that if a little time was required to deposit the stock the Stockholder could still sign the enclosed "*Agreement*" and mail or deliver it to the Bank and that this would make the Stockholder a party to the Voting Trust Agreement, but the Stockholder should then proceed to deposit the stock in order to obtain Voting Trust Certificates. Neither the Voting Trust Agreement nor the Huber letter provided or contemplated that a Stockholder would become a party to the Voting Trust

Agreement by merely signing the card without deposit of his stock. By letter dated February 1, 1954, the Voting Trustees, by the Depositary's Trust Officer, wrote the Stockholders:

> "This is to notify you that the Voting Trust Agreement dated December 31, 1953, between the undersigned Voting Trustees, the Monroe State Savings Bank as Depositary, and those Stockholders who have subscribed thereto is now in full force and effect.
>
> "The Voting Trust Agreement has been executed by the holders of more than a majority of the outstanding Capital Stock of the Company. Pursuant to Section 34 of the Corporation Act of the State of Michigan, which provides for Voting Trusts, a copy of the Voting Trust Agreement has been filed in the registered office of Monroe Paper Products Company in Monroe, Michigan.
>
> "Signers of the Agreement who have not yet received the Voting Trust Certificate to which they are entitled may obtain the same from the Monroe State Savings Bank, Depositary.
>
> "For a short period of time, the Voting Trustees will continue to accept additional signatures and deposit of stock from stockholders who wish to avail themselves of the benefit of the Voting Trust Agreement."

Actually, the Voting Trust Agreement had not then been executed by the holders of a majority of the 186,671 shares in the Company. Defendants make no claim that the Voting Trust Agreement or counterparts thereof were signed by holders of more than 15,214 shares nor that signed signature cards only were obtained from holders of more than 81,914 shares. Except to a small extent there is no evidence that such signatures were made by the Shareholders. On March 2, 1954, 25,800 of these shares (including 7,503 shares of trustee Sempliner and his Mother; 1,297 shares of Sandroff and 190 shares of Weiperts) had not been deposited. Through February 1, 1954, not more than 37,411 shares had been deposited. Through February 3, 1954, not more than 45,971 shares had been deposited.

On February 9, 1954, Knapp, using the Company's letterhead and at Company expense, wrote a letter to Stockholders, prepared by Francis, reading in part:

> "As President of the Company, I have previously advised Stockholders that it would be my policy to keep you fully informed of all developments regarding your Company.
>
> "You have recently received notification from Leo Boudinet, Trust Officer of the Monroe State Savings Bank, of Monroe, Michigan, that a Voting Trust Agreement for those stockholders electing to participate in it has been consummated, and is now in full force and effect. I am advised that approximately 80% of all stockholders of the Company, owning more than a majority of all outstanding stock, have entered the Voting Trust. A copy of the Voting Trust Agreement is on file with the Company. I am advised that the Voting Trustees have announced that the Voting Trust is now closed to further participation. • • •.
>
> "This litigation seeks to attack the Management of your Company and the majority of its Board of Directors, and the payment to stockholders of the special dividend of January, 1954. The interest of the Company and all stockholders will be fully protected by legal counsel well qualified to perform such services.
>
> "I wish further to report to you that at the last meeting of the Board of Directors, January 27th, 1954 a dividend of 15¢ per share was declared payable March 15th, 1954, to stockholders of record March 1, 1954."

The representations in the foregoing letters of February 1 and 9 that the Voting Trust Agreement had been executed by the holders of more than a majority of the Company's stock and was in force and effect were false.

By March 2, 1954, the number of deposited shares was increased to approximately 72,000 shares. Additional deposits were thereafter made, and between March 9th and April 26, 1954 the Depositary issued 69 additional Voting Trust Certificates for more than 23,000 shares. During that period the signature cards which previously had been merely retained in the Depositary's file, were stapled to a

partly signed copy of the Voting Trust Agreement. The Depositary did not sign the names of such Stockholders to the Voting Trust Agreement. None of the deposited stock had been transferred on the books of the Company as of April 22, 1954. On that date the Court issued a Temporary Restraining Order until April 26, 1954. Thereafter, by agreement of counsel, no stock was transferred up to date. On June 28, 1954, 94 shares were deposited and Voting Trust Certificates therefor were issued.

The number of shares was blank on many of the signature cards but was inserted by the Depositary and others without authority. In similar manner the numbers of shares shown on some of the cards were changed.

All opportunities to purchase Company stock that came to the attention of the Company officers and employees in connection with their solicitation for the Voting Trust were diverted from the Company and exercised by Defendant Raney, Company employees and a Monroe broker acting for Sandroff. After Plaintiffs' action herein was commenced and prior to March 12, 1954, Raney entered into an arrangement whereby Sandroff would supply funds for the purchase of additional shares of stock in the Monroe Company and Voting Trust Certificates for shares deposited under the Voting Trust Agreement. Without disclosing that Sandroff was the one who would supply such funds, Raney arranged with a Monroe Broker to handle the making of such purchases with funds to be received by the Bank which was also the Depositary under the Voting Trust Agreement. Pursuant to such arrangement Sandroff furnished the bank over $43,000 with which the broker made purchase of shares and Voting Trust Certificates covering shares. This was during the time that Raney was making the excess purchase of waste paper from Sandroff. Some of the purchases were thus made from persons who had gone to the Company's office seeking to sell their stock and had been referred to the broker by the Company officers or employees. Others from whom purchases were so made included Stockholders who were counted as having agreed to the Voting Trust Agreement, but had not deposited their stock, and Stockholders who had deposited their stock and had received Voting Trust certificates there-

for, which the broker purchased. The first purchases of stock and of Voting Trust Certificates so made by the broker were on March 12, 1954. All purchases made by the broker were at prices of $15 or more per share.

The total purchase were 1,040 shares of stock and 1,848½ shares covered by Voting Trust Certificates for which new stock and Voting Trust Certificates were issued to Sandroff Company. The new stock for the 1,040 shares was sent to the Voting Trust Depositary by Raney's secretary and, together with the new Voting Trust Certificates are still held, unendorsed by the Depositary. No explanation could be obtained from the Depositary's Trust Officer as to why the Certificates so issued are still held by the Depositary nor as to whom the dividends on the stock covered by the Trust Certificates were being delivered.

Commencing April 8, 1954, Vogel, as agent for Stieglitz & Co., New York brokers, purchased 11,797½ shares of stock covered by the Demands, Assignments and Voting Trust Certificates, tendering same to the Bank. This demand was refused upon the advice of Weipert.

The foregoing purchases of additional shares, demands and assignments made by Waterbury were made in good faith and necessary effort on its part to protect its original investment in Monroe and to prevent great depreciation in the value of its stock by the wrongful acts of the Defendants' officers and Directors and of Defendant Huber.

The Voting Trust Agreement provides that the voting Trustees shall, thereunder, have the following, among other, rights:

> 1. To possess the legal title to the deposited shares; to have the deposited shares transferred to the Voting Trustees upon the books of the Company: to receive dividends (to be paid over to the holders of the Voting Trust Certificates), and to exercise all rights of every name and nature in and to the deposited shares, including the sole and exclusive right to vote, at all stockholders' meetings.
>
> 2. To exercise the exclusive power and discretion to sell all of the deposited shares in lump at a price of not less than $15 per share, (the depositing stockholders agreeing not to sell their deposited shares

during the period December 31, 1953, to and including December 30, 1955); to receive additional shares under the Voting Trust Agreement, and to purchase and sell additional stock and additional Voting Trust Certificates; to join in a syndicate to purchase under the power of sale, and to be under no disability to contract with the Company, and to receive payment of their expenses (other than compensation for their services) and their disbursements, out of the proceeds of sale.

3. To act and receive compensation as a Director and Officer of the Company or agent or member of any Committee thereof.

4. To appoint successor depositaries and successor Trustees under the Trust Agreement and to determine all questions arising under the Voting Trust Agreement, including exercise of the Voting power given to the Trustees, by a decision of the majority of Trustees.

Consummation of the Voting Trust Agreement will deprive Monroe of the opportunity, from time to time, to purchase and retire anything less than the entire amount of the deposited stock, and will deprive Plaintiffs, other Stockholders and the public of any opportunity to purchase any part of such stock.

The Voting Trust Certificates issued and to be issued under the Voting Trust Agreement were not registered with the Securities and Exchange Commission under Securities Act of 1933 or otherwise. The Voting Trustees and the Depositary and Agent under the Voting Trust Agreement repeatedly used and caused to be used means and instruments of transportation and communication in interstate commerce and the mails to carry and transmit the Huber letter dated December 31, 1953, and subsequent and other related correspondence and telegrams, and carried and caused to be carried, through the mails and in interstate commerce numerous certificates of stock deposited, and the Voting Trust Certificates issued, under the Voting Trust Agreement.

The Voting Trust Certificates issued and to be issued under the Voting Trust Agreement have not been accepted

for filing, nor has any license to deal therein been issued, under the so-called Michigan Blue Sky Law.

44. On or about February 3, 1954, the Defendants were notified by service of the complaint in this case that it was the claim of the Plaintiffs that the Defendants had violated the Michigan and Federal Securities Laws.

On or about February 4, 1954, Edward H. Rakow, in charge of the local SEC office, telephoned Weipert and advised him that the Commission was investigating the matter. At this time, less than 25% of the stock of Monroe had been deposited for exchange for Voting Trust Certificates. Arrangements were made for Rakow to meet Weipert at Monroe in February 8, 1954. Prior to this time he had some contacts with Weipert while they were both employed in local law offices.

The conferences between Rakow and Weipert lasted for several hours. Rakow made extensive pencil notes on separate sheets of paper. Weipert turned over to him a number of documents which he thought contained information that would assist Rakow in his investigation. After returning to his office in Detroit, Rakow made up a written report containing the substance of his pencil notes and then destroyed the original records. He sent a copy of this report with the exhibits to the Regional Office, which was at that time located in Cleveland. Rakow told Weipert that in his opinion the Defendants had violated the Securities Act and that it would be his duty to report the matter to his superiors.

Weipert was familiar with the Securities Act. He expressed the opinion that the issue was exempt from the 1933 Act because the offering did not constitute a public offering. He based his opinion upon the case of *SEC v. Ralston-Purina Co.*, 346 U.S. 119, which he read shortly after it was published in June, 1953. Rakow insisted that there was no question about the violation of the Securities Act and discussed with Weipert the SEC registration form used for Voting Trust Certificates. At Weipert's request, he left a copy of this form with him. He also promised to attempt to secure a form of a prospectus used in connection with rescissions and belated registrations. This was in re-

sponse to Weipert's request for information about what the Defendants could do about their failure to register in accordance with the provisions of the Act.

During the discussion Weipert stated, "We will do everything we can and take such steps in the rescission procedure in order to rectify the situation."

On the following day, February 9, 1954, Weipert wrote to Rakow as follows:

> "Allow me to repeat, in the added solemnity of writing, my assurance to you, that so long as there is any doubt in the minds of the Security and Exchange Commission, no further solicitations will be conducted in any way. *As we stated, the goal had been reached before the question arose, and further solicitation would in any event have been more technical than real, and that only because of the 'open end' feature of the Voting Trust agreement.*
>
> "To give added assurance on this point, President Burton S. Knapp is writing to all stockholders, advising that the Voting Trust is now closed to further participation.
>
> "We will proceed to take any steps you wish us to take. If registration is still indicated when the Commission has analyzed the full facts, registration will be processed with all speed. We are prepared to go to Washington at any time. It will no doubt be preferable to wait until your report is completed, and we have the materials you are obtaining for us; but if any questions arise earlier, that need on-the-spot answers, we shall greatly appreciate being advised and will be governed accordingly."

The portion of this letter underlined was false and Weipert knew it was false. It may have been this type of misrepresentation made on many occasions by the Defendants and their agents that led the SEC to conclude that the investors did not need the protection that Congress sought to furnish them by adoption of the Securities Act.

Rakow was an honest intelligent witness who had no interest in this case except to see that he conscientiously did everything in his power to enforce the law. The strict limitations placed upon him as to the extent of his right to tes-

tify by both oral and written instructions apparently made him very nervous. It was obvious that he disclosed everything he thought he could without endangering his relations with his superiors. He could not recall all of the details of his conference with Weipert in February, 1954. The report that he made immediately after the conference was in Court during the trial in the possession of SEC representatives. They refused to permit the Court to examine the report. There can be no doubt that it would have been helpful to Rakow for the purpose of refreshing his recollection if he had been permitted to use it. It is impossible to reconcile his testimony with that of Weipert. Weipert has a very direct interest in the outcome of this suit. Rakow has no such interest. There is no reason to doubt the accuracy of Rakow's testimony as to the matters that he thus distinctly recalled. On the other hand, Weipert was always an adverse witness and at times assumed the attitude of a hostile witness. Part of Weipert's records were either destroyed or misplaced. About the time that the litigation was instituted, he ceased keeping records. As a result, his recollection was hazy about many matters of great importance. At times his testimony was confusing and contradictory. There is no doubt that he attempted to convince Rakow that the Voting Trust Arrangement had been consummated prior to February 8, 1954, and it would therefore serve no useful purpose for the Commission to secure an injunction. In order to thus deceive Rakow, Weipert failed to disclose some material facts and misrepresented others. He orally promised that no further solicitations would be made and no further steps taken to consummate the Voting Trust. He also orally promised to proceed at once to offer rescission as to the certificates previously issued. He failed to keep these promises.

Weipert notified the Trust Officers of the Depository on February 8, 1954, that the trust was closed to new depositors, but did not notify them that the SEC was investigating the matter until about February 15; neither did he notify these bank officers that the use of the mails for the receipt of the deposit of stock and issuance of certificates constituted a violation of the law.

On February 10, 1954, Weipert wrote Rakow enclosing a newspaper article containing an announcement that the Trust had been closed. On the same day, Rakow wrote Weipert that he had been unable to locate copies of a prospectus but had referred the request to the Washington office.

On February 11, 1954, Weipert furnished Rakow with a copy of a letter prepared by Francis and signed by Knapp, dated February 9, 1954, which reads as follows:

"To all Stockholders of the
Monroe Paper Products Company:

"As President of the Company, I have previously advised stockholders that it would be my policy to keep you fully informed of all developments regarding your Company.

"You have recently received notification from Leo Boudinet, Trust Officer of the Monroe State Savings Bank, of Monroe, Michigan that a Voting Trust Agreement for those stockholders electing to participate in it has been consummated, and is now in full force and effect. I am advised that approximately 80% of all stockholders of the Company, owing more than a majority of all outstanding stock, have entered the Voting Trust. A copy of the Voting Trust Agreement is on file with the Company. I am advised that the Voting Trustees have announsed that the Voting Trust is now closed to further participation.

"You also received through the mail written communications signed by John P. Kinsey, a Director of your Company from Torrington, Connecticut, in criticism of the Voting Trust. No other Director signed these communications, and you should know that the majority of the Directors of your Company had no knowledge of the same until received in the mail.

"The same Mr. Kinsey, who has been a Director of your Company for four months, and Mr. Lawrence G. Kunkel, also of Connecticut, and the Waterbury Corrugated Container Company, a Connecticut corporation, have now commenced a suit in the Federal Court at Detroit, Michigan. Mr. Kinsey and Mr. Kun-

kel are officers of the Connecticut corporation. In this suit, it is claimed that the majority of the Directors, namely: Chas. E. Raney, George A. Blum, Don B. Leathers, Arthur W. Sempliner and Burton S. Knapp, who were elected by the Stockholders at the Annual Stockholders' Meeting last September, are not acting in the best interests of the Company and its Stockholders.

"The Connecticut purchasers of stock in your Company have now resorted to litigation as stated above. The block of stock now owned by the plaintiffs in this court action is substantially the same block of your Company's stock which failed in the concerted effort to deliver control of your Company to National Container Corporation of New York last fall and also failed in concerted effort to obtain control of your Company's management at the Annual Stockholders' Meeting of last September.

"This litigation seeks to attack the Management of your Company and the majority of its Board of Directors, and the payment to stockholders of the special dividend of January 1954. The interest of the Company and all stockholders will be fully protected by legal counsel well qualified to perform such services.

"I wish further to report to you that at the last meeting of the Board of Directors, January 27th, 1954, a dividend of 15¢ per share was declared payable March 15th, 1954, to stockholders of record March 1, 1954.

"Sincerely yours,"

It will be noted that this letter makes no reference to the SEC investigation or the Plaintiffs' claim that the Trust was unlawful. The statement reading, "The interests of the Company and all stockholders will be fully protected by legal counsel well qualified to perform such serivces," obviously referred to Francis, Weipert and Sempliner. These attorneys were representing the Defendants, not the Corporation.

On February 3, 1954, a conference was held between the Defendant Directors and Francis and Weipert; Sempliner

was not present, but was reached by telephone. It was agreed that Francis would enter his Appearance as attorney for the Corporation; Weipert for the Voting Trustees; and Sempliner for himself and the other Directors on all phases of the litigation, except the Voting Trust part of it.

On March 12, 1954, Charles H. King entered his Appearance for Defendant Huber as a substitute for Weipert. King has been absent from many of the Court hearings with the consent of the Court.

On Sepember 17, 1954, the Detroit law firm of Fischer, Brown, Sprague, Franklin & Ford, entered its Appearance as Of Counsel to Weipert for the Voting Trustees.

The Defendants' attorneys, with the exception of King, have collaborated with each other very closely. It has been impossible for the Court to always definitely know which phase of the case the respective defense attorneys were attempting to present. The arrangement has worked to the advantage of the Defendants, because it gives them an excuse to individually examine witnesses and interpose objections to evidence. This was particularly true during the time of the Pre-trial Discovery proceedings. At no time can it be said that Francis cooperated with the Brands in their intelligent and industrious efforts to protect the rights of all the stockholders.

All of the conferences hereinafter referred to between the Defendants and their representatives and Commission employees were ex parte conferences. The Plaintiff's attorneys were never notified of these conferences, or invited to attend them. In Weipert's language, contained in an affidavit prepared by him and signed by Knapp, he considered that: "* * * the Plaintiffs are seeking to deprive the majority stockholders of the legitimate advantage gained by them in forming a Voting Trust under the express provisions of the Michigan Corporation Code. Section 34."

From February 8, 1954, to March 17, 1954, Defendants made no effort to carry out the promises made to Rakow that they would give the stockholders, who had exchanged their stock for Voting Trust Certificates, an opportunity

to rescind. In the meantime, the Defendants and their attorneys did everything they could to obstruct the Plaintiffs' attorneys in their efforts to secure information as to the Voting Trust and the SEC activities. They did not disclose to the Commission that they were not keeping their promise not to make further solicitations, nor was any attempt made to correct the false impression created at the February 8th conference and in Weipert's letter of February 9 that the Voting Trust had been fully consummated.

During this period, the Defendants continued to secure deposit of stock and to issue Voting Trust Certificates in violation of the Securities Act, and in defiance of the stipulations entered into in open Court in an effort to secure the amount necessary to retain control.

The Defendants' attorneys assured the Michigan Corporation and Securities Commission that "if it is determined that the Voting Trust involves an issuance subject to registration, or that serious question exists as to whether it might be, steps will be taken to register. We believe that the first step to take is to clear the matter in Washington and will keep you fully advised."

On March 17, 1954, Sempliner and Weipert had a conference in Washington with the following members of the Commissions staff: Charles Eisenhart, Sidney Mendlesohn, and Walter G. Holden. At this time Sempliner and Weipert knew that Raney had arranged for the purchase of stock and Voting Trust Certificates with money furnished by Sandroff. They also knew that a large number of shares and certificates had already been purchased and that Waterbury was endeavoring to make purchase of such stock and certificates. On this date they assured the members of the Commission's staff that no further violations of the law would be committed; that all of the depositors would be given an opportunity to rescind; that they would register the Trust as required by law. They further sought the aid of the staff members as to the form of prospectus and offer of rescission to be used. They gave the Commission a document signed by Blum purporting to disclose the names of the Company's out-of-state stock-

holders. This document did not disclose the operation of any of the escrow agreements or Sandroff's connection with them.

After the Washington conference, Weipert started to work on the preparation of a registration statement and prospectus which were never filed. Neither of these documents disclosed the Escrow purchase program. During this period, Weipert, Sempliner and Francis were in frequent conference with one another with reference to the steps to be taken in connection with their program to lull the Commission into inaction.

On March 25, 1954, Weipert notified Rakow of the Washington conference. He stated that he planned to prepare and file a registration statement. He said he had examined a file in a matter involving rescission and re-offering. On April 12, 1954, Sempliner and Weipert held a prefiling conference in Detroit with Rakow. On April 14, 1954, Sempliner held a similar conference with a member of the Commission's Staff in Washington.

Drafts of a registration statement and prospectus, including an offer of rescission, were submitted for suggestions. These gestures were intended to give the Commission every indication that the Defendants intended to comply with the law. Weipert sought to explain his failure to act more promptly on the ground that he was kept busy taking depositions in this case.

On April 22, 1954, Weipert, Sempliner and Francis sought to have the Court enter an Injunction restraining Waterbury from purchasing further stock. On this date they did not disclose to the Court that they had promised a Commission representative that they would register and offer a rescission.

At a Pre-trial deposition hearing held April 29, 1954, Weipert testified as follows:

> "Q. And then so far as the Voting Trustees are concerned, you know that it is not their intention to receive deposit of any more stock under the agreement?
>
> "A. It is not at the present time.
>
> "Q. Unless it has been signed by signature to

the copy of the Voting Trust Agreement or by signature card prior to the commencement of this suit; is that right?

"A. That is right.

"Q. And you think we can rely on that without there being any change in that?

"A. Well, I don't know that we can forecast the future. We have no present intention. That is all that I am prepared to say."

At this time he still insisted that the Trustees did not consider that the Voting Trust Agreements were subject to the Securities Act. Neither he nor any of the Defendants or their attorneys at any time urged the Commission to institute proceedings so that this question might be settled by a Court Judgment, except insofar as a letter written on July 1, 1954, by Knapp apparently sought to have the question of the violation of the Fraud Section of the Act determined by a Court.

With a feeling of assurance that the SEC would not attempt to secure an Injunction, Defendants took no further steps toward rescission or registration.

About the middle of May, the SEC closed the Cleveland regional office and transferred the Detroit office to the jurisdiction of the Chicago regional office. Thomas B. Hart is head of the Chicago regional office and is responsible for the supervision of the Detroit office.

After the files were received from Cleveland, Hart examined them and discovered the Monroe file. He thereupon decided to come to Detroit and have a conference with the Defendants with the intention of informing them that they would be compelled to carry out their promises to register with an offer of rescission or he would recommend to the Commission that proceedings be instituted immediately to secure an Injunction. It appears to be the view of all of the field officers who testified in this case that they can do nothing aoout enforcing the law without specific authority from the Commission. Hart arranged for a meeting to be held on June 30, 1954, in Detroit. The Commission representatives knew at this time that the Depository was holding stock certificates for parties to the

Trust Agreement for which certificates had not been issued. All of the Director Defendants attended this meeting except Sempliner. Weipert and Francis were also there. Hart and Rakow represented the Commission.

Hart pointed out that the promise of the Defendants and their attorneys to offer to rescind and to register had not been fulfilled. He also stated that Injunction proceedings had been delayed to give the Defendants an opportunity to make a legal re-offering because their counsel had assured the Commission representatives they intended to do so. The Defendants and their attorneys were informed that if they did not live up to their promises Hart would recommend to the Commission that Injunctive proceedings be instituted at once.

Francis took a leading role at this conference as a representative of the Defendants. He furnished the Commission representatives with some data furnished by Cook, of the Depository Bank. He stated that the Trustees admitted a technical violation of the Securities Law. He sought to convey the impression that this violation occurred because they had relied upon the legal opinion dated November 25, 1953, addressed to George Huber from the Detroit law firm, which is referred to in another finding. He did not inform them that the letter he had was actually written February 18, 1954. He urged the Commission representatives not to enforce the law because that would mean that the Commission was taking sides against the management. When he found that the staff representatives intended to enforce the law regardless of the effect it might have upon some individuals who had violated it, he requested a conference with the full Commission in Washington.

The Defendants were unwilling to comply with the Securities Law unless they could retain control of the majority stock which they had secured in violation of the law. It seems obvious that they were not so much concerned about the expense and trouble involved in the registration as they were that if the stockholders realized that they had surrendered the valuable property right of participating in the affairs of the Company without getting any consideration for such a transfer of rights, enough

of them would elect to rescind so that the Defendants would no longer have control of the Company.

At that time, at least Weipert and the officers of the depository bank had a sufficient number of inquiries about the effect of the Voting Trust Agreements to learn that not all of the stockholders understood this transaction. One of the Stockholders who did not understand the transaction and sought information of the officers of the Depository Bank was Holefca, who is referred to in another finding. Holefca is an exceptionally intelligent individual, well acquainted with business transactions. It seems perfectly obvious that if he did not understand this transaction, there must be many other stockholders who did not understand it.

Some discussion was had with reference to the violation of the Fraud Sections of the Act, and on July 1, 1954, Knapp wrote a letter to Rakow as follows:

> "May I take this opportunity to express to you and to Mr. Hart our appreciation for having been given the opportunity to appear before you, gentlemen, and I sincerely hope that we have presented the details pertaining to the case with which, perhaps. you were not familiar.
>
> "I was very much surprised to be informed that several of the stockholders of the Monroe Paper Products Company had, I assume, made claims in the form of sworn statement to the effect, that one or more of the several members of the office personnel of this Company had at the time of contacting stockholders in the Trust Agreement Sign-Up, misrepresented the facts as they pertained to this Agreement or had used high pressure salesmanship tactics.
>
> "I am deeply concerned over the aforementioned claims; and therefore called a meeting of Messrs. B. Kirby, R. Case, G. McMahon, J. Gutmann and G. Bennett and advised them that one or more of them have been designated in these complaints as the parties now on record as having misrepresented the facts. Each and every one of them request that he be given the opportunity to present their testimony and make a sworn statement as to the facts.

"I concur with them in this appeal. As per the record, they are now accused of an unethical act by a party and they should be afforded the opportunity to present their testimony and judgment then can be made of the facts as of record.

"Again, may I say that I sincerely trust that I have not only presented their viewpoint but also that of my own and, in order to have a complete presentation of all the facts, it is hoped that these requests will be granted."

An application by the Commission for an Injunction at this time would give Knapp the hearing he requested. Apparently, the other Defendants or their attorneys did not want such a hearing. On July 2, 1954, Weipert wrote Rakow requesting a hearing before the Commission "in the event Court action should be considered necessary." He stated the Defendants would sell all of the stock under the Voting Trust to Waterbury if at least $15 a share could be secured.

The Commision granted Weipert's request and a meeting was held in Washington, August 4, 1954. The Defendant Directors, Francis and Weipert attended this meeting. Some members of the Commission Staff were also present. It was not disclosed whether any other stockholders attended. Plaintiffs' attorneys were not notified of the meeting, nor were they invited to attend it. There is no way of determining whether other stockholders, and the Plaintiffs, or their attorneys, would have been permitted to attend this meeting had they known about it and requested to be heard.

The meeting did not last very long. The Defendants and their attorneys were introduced to the Commissioners. Sempliner and Weipert made arguments to the Commission. In their argument, they sought to convey the impression to the Commission that the Voting Trust had been reviewed and approved by the Clark Klein law firm. They attempted to convince the Commission that no action was necessary because of the stipulation as to the transfer of the stock and because the Trustees had promised to issue no more certificates. There were also other mis-

representations made at this time. They also pointed out that if they were compelled to comply with the law they would lose the advantages that they had gained in violation of it. This they were unwilling to do unless the Commission insisted on enforcing the law and compelling them to do so. They again stated that they would be willing to sell the stock at $15 per share. Sempliner presented some additional information in writing.

After this hearing had been concluded, Weipert had a conversation with Holden in the hallway, at which time Holden asked for information concerning certificates issued since the March 17th conference. Holden testified that he had the impression that Defendants were not going to register,

On Sepember 14, 1954, Sempliner again conferred with Holden in Washington. He stated that because of the stipulation in this suit no steps had been taken to transfer the Voting Trust stock into the names of the Trustees. He stated that the Trustees felt that additional Voting Trust Certificates should be issued. Holden again reminded Sempliner that further use of the mails to deliver Voting Trust Certificates would constitute a violation of the Act. Sempliner then requested the Commission to act as a mediator to effect a settlement of this suit by a consent judgment setting aside the Trust on the condition that Waterbury agree to buy all of the deposited stock, except that owned by members of management, at $15 per share.

On October 9, 1954, the General Counsel for the Commission advised all of the parties that the Commission had decided not to take any action at that time, although it would keep the matter under surveillance.

Apparently the obstructionistic tactics carried on by the Defendants were adopted in the hope that Kinsey would become discouraged and consent to compromise, not only his claim but that of the other stockholders similarly situated. If Sempliner could definitely assure Kinsey that the SEC would not take any action, Kinsey might consider it less expensive to pay the excessive price for the stock than to continue with the litigation. At this time, Sempliner knew that Kinsey had paid or incurred obliga-

tions to pay large sums of money for attorneys fees, stenographers transcripts, and other expenses connected with the Pre-trial discovery. He never was successful in securing a promise of the Commission that they would not enforce the law, as a matter is still under investigation by the SEC and the Department of Justice.

Civil procedure Rule 23 prohibits the dismissal of the type of class action herein involved without a hearing and the approval of the Court. In a case of this kind, it is the duty of the Court to make certain that the interest of all Stockholders, whether large or small, are adequately protected. In fulfilling this obligation, the Court has frequently asked witnesses questions and asked for other documentary proof. As far as Messrs. Brand is concerned, there is not the slightest evidence that they at any time have neglected the interest of the other Stockholders in favor of the Plaintiffs who instituted this action. Because of the unusual obstructionistic tactics of Defendants' counsel and the reluctance of the Defendants' as witnesses, the Court was compelled on frequent occasions to intervene so that the truth could be ascertained. This was also true as to some of the other witnesses who were under the influence of the Defendants.

Plaintiffs' attorneys attempted to secure information as to what happened at the various conferences and at the meeting of the Commission on August 4, from the Defendants and their representatives. It was not until they failed to get this necessary information from these adverse witnesses that they sought to get the information from the Commission's representatives. The Commission permitted Rakow, Hart, and Holden to testify to a limited extent and to disclose a small portion of the Commission's records.

The delay of the employees of the Commission in seeking Injunctive relief has deprived investors of the protection that Congress intended to afford by the adoption of the Securities Acts. The failure of the employees to enforce the law was due to the fact that the Commission would not give them permission to do so. The only plausible explanation for the failure of the Commission to act

was that the members of the Commission had been misled by the misrepresentations made by the Defendants and their attorneys. This was a part of the conspiracy of the Defendants to retain control of the Corporation.

Apparently, the Defendants also misled William H. Timbers, General Counsel for the Commission, into believing that Rakow, Hart and Holden were mistaken and that the many small investors in the Voting Trust Certificates residing in such distant places as California and Florida did not need the protection afforded by the Securities Acts. On February 11, 1955, during the course of this trial, this colloquy took place:

> Timbers: "* * * may I thank you very much for indicating some of the claims in the case, and I appreciate your Honor's effort to bring me to an understanding of them."
>
> "* * * We have very limited statutory powers as conferred by Congress, to take any active part between the parties in this private suit * * *."
>
> "* * * the Securities and Exchange Commission—as a matter of sound public policy, is generally disinclined to participate in private litigation * * *."
>
> "The Eisenhower Administration is dedicated to the philosophy of Government, to which I happen to subscribe also that in so far as private citizens can handle their own affairs, they should be permitted to do so without interference by the Government, and without the Securities and Exhange Commission * * * entering a private suit in the role of Amicus Curiae, and so loading the dice against one side or the other by the use or disabuse of the taxpayers' money, particularly since Congress has given no satisfactory function in the role of Amicus Curiae."
>
> "We still have the discretion to aid the Court * * * despite that general philosophy of this Administration and of Congress, as a matter of fact, against our participating as Amicus Curiae." And it was in the exercise of that discretion, your Honor, that I believe some many months ago, at the time you first indicated to Mr. Kaess, the United States Attorney here, that

there were possibly matters within his jurisdiction, at that time I believe Mr. Rakow tendered to your Honor, on behalf of the Commission, our services as Amicus Curiae * * *"

"* * * and even in the area where we have a discretionary function, we necessarily must be guided by the Government of which we are a part."

The Court: "More than one year ago, Mr. Rakow discovered that the Defendants had violated the law. You have a means whereby you can secure an Injunction. If an Injunction had been secured in February, 1954, the Sandroff dealings, that I told you about, plus a great many others, could not have occurred."

"* * * if you will also think about Mr. Rakow's testimony, you will remember that on a few, several or many occasions, he answered questions, 'I don't recall.'"

"You will also remember that Mr. Rakow said that it was the regular course of business of the office that he operated to make notes of the transactions as they occurred, and it was the regular course of business to record those notes. He stated that those records that he made from day to day were no longer available but that the substance of the records that he made were transferred to a report and that report is now in your possession."

"I have never thought that we needed any help from the Securities Commission so far as the law is concerned * * *"

"The place that your Commission can be of assistance is deciding that the public interest does not require that you conceal evidence, that the public interest requires that you disclose evidence, and if you can persuade the Commission when you get back to Washington to waive their claim of privilege, you will do more to expedite the hearing in this case than all the briefs that you and your associates can write in the next six months."

It is impossible to believe that either the Commission

or its General Counsel thought that the Securities Act were adopted for the purpose of interfering with legitimate private business. It is apparent from a reading of the legislative history of these Acts that all Congres intended to do was to bring to the securities market some of the protection that had long been afforded to purchasers in other markets, such as uniform standards of weights and measures.

The Defendants were not only the "issuers" of the securities, but also performed functions that are sometimes performed by "underwriters" and "dealers."

The following quotations from House Report No. 1383, relating to the Act of 1934, are particularly pertinent to this case:

> "A renewal of investors' confidence in the exchange markets can be effected only by a clearer recognition upon the part of the corporate managers of companies whose securities are publicly held of their responsibilities as Trustees for their corporations. Men charged with the administration of other people's money must not use inside information for their own advantage.
>
> "Fair corporate suffrage is an important right that should attach to every equity security. * * * Managements of properties owned by the investing public should not be permitted to perpetuate themselves by the misuse of corporate proxies. Insiders having little or no substantial interest in the properties they manage have often retained their control without an adequate explanation of the management policies they intend to pursue. Insiders have at times solicited proxies without fairly informing the stockholders of the purposes for which the proxies are to be used and have used such proxies to take from the stockholders for their own selfish advantage 'valuable property rights'."

In this case, the Defendants solicited proxies for the 1953 meeting by misrepresentation and failure to make a complete disclosure of their selfish purposes. They thus deprived the Stockholders of an opportunity for "fair corporate suffrage."

After having thus secured control of the Corporation,

they attempted to deprive the Stockholders of "fair corporate suffrage" for five years in the future by the issuance and sale of the Voting Trust Certificates.

The following quotations from House Report No. 85 relating to the 1933 Act are also pertinent to this case:

> "There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.
>
> "This proposal adds to the ancient rule of caveat emptor, the further doctrine 'let the seller also beware'. It puts the burden of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence.
>
> "What we seek is a return to a clearer understanding of the ancient truth that those who manage banks, corporation, and other agencies handling or using other people's money are trustees acting for others.
>
> "A demand that the persons, whether they be directors, experts, or underwriters, who sponsor the investment of other people's money should be held up to the high standards of trusteeship.
>
> "Honesty, care, and competence are the demands of trusteeship. Whereas to insist upon the assumption of duties of trusteeship is to return to the ancient truths of fair dealing. Instead of impeding honest business, the imposition of liabilities of this character carries over into the general field of security selling, ethical standards of honesty and fair dealing common to every fiduciary undertaking."

Undoubtedly the members understand the objectives that Congress intended to achieve when it created the Commission.

The delay from February to June 30 was due to the promises made by the Defendants that they would comply with the law. The delay since June 30, 1954, is due to the fact that the Commission did not authorize its employees

to enforce the law. The misrepresentations made to the Commission and its representatives were made in furtherment of the conspiracy established in this case.

It seems apparent from the limited amount of information that the Commission was willing to permit the Court to have that the misrepresentations made by the Defendants led the Commissioners to believe that this suit involved only a contest between the Stockholders for the control of the Corporation. It appears to be obvious that the Commission could not have understood that the real motives of the Defendants was to continue their control of the Corporation for their private gain. The Commission apparently did not understand that many small investors located in various parts of the Country were being defrauded by the Defendants.

The Defendants' attorneys realized that the policy adopted by the Securities and Exchange Commission limiting the testimony that its employees could give in court and concealing records containing pertinent evidence was advantageous to them. They actively assisted the Commission attorneys in their efforts to prevent the Trial Court from examining documents for the purpose of determining:

First: Whether such documents were privileged.

Second: Whether the Commission had claimed privilege as to such documents.

Third: Whether such documents were relevant to the issues involved in this litigation.

They apparently do not agree that "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U. S. 1, 10.

On an occasion when no representative of the Commission was present, the Defendants' attorneys sought to take advantage of the privilege claimed by the Commission to have a document excluded from evidence after the Commission had specifically waived its privilege as to that document.

They also made a Motion to Strike from the record testimony voluntarily given by the General Counsel of the Commission, on the grounds that he was not available

for cross-examination. Neither the Plaintiffs nor their attorneys were in any way responsible for the fact that this witness was unavailable for cross-examination. The Plaintiffs' attorneys wanted the witness so that they could continue their examination of him.

45. From time to time Feinberg complained about the records and inadequacy of the periodic reports submitted by Moss. At a Directors' meeting held on January 27, 1954, the matter of the declaration of dividends came up. Director Feinberg appeared to have the not unreasonable view that before the Board voted to pay a dividend it should have sufficient information to determine whether the Company was operating at a profit or loss. He suggested that either Moss or independent auditors be requested to furnish a certified audit. Action was deferred pending procurement of estimates of cost.

Moss agreed to certify his audit for $500; Peat, Marwick's price was $2,000, plus out-of-pocket expense. Leathers and Sempliner sought to have the matter deferred until the end of the fiscal year. Kinsey made a motion that Peat, Marwick be employed to make a Certified Audit as of February 28, 1954. Knapp, Raney, Blum, Sempliner and Leathers voted against the Motion. Kinsey inquired if the vote would be different if he paid part or all of the cost of such audit, but was informed that the vote would not be different. Sempliner then made a Motion that a Certified Audit be made at the close of the fiscal year by an auditor to be subsequently chosen by the Board. This motion was carried against the votes of Krave, Feinberg and Kinsey.

On May 27, 1954, Kinsey expressed the view that an outside accountant should be employed, and that he personally would be willing to pay all expenses in excess of $500. Raney stated that this would not be fair to the Company's accountant. At this time, Sempliner warned his associate Directors that it was the policy of the Internal Revenue Department to make a complete audit of a Company's books when the company changed auditors. So far as this record shows, the books of Monroe have never been

audited by the Internal Revenue Department, and it may be that the fear of such an audit was well-founded.

Sempliner favored acceptance of Kinsey's offer, with the restriction that the work of Peat, Marwick be limited to a certification of the Moss figures for the year ending June 30, 1954, and that Moss's figures for previous years be accepted; he could see no harm in having the certification so made in view of the limitations on the scope of the audit. The resoultion thereupon adopted was that Peat, Marwick be employed to make a certified balance sheet audit for the purpose of showing the net worth of the Company as of June 30, 1954, Kinsey to pay the cost thereof in excess of $500. Oral instructions were given to Peat, Marwick by Raney and on June 28, 1954, [illegible], Marwick in a letter to Raney stated:

> "In accordance with your recent oral instructions, we are to make an examination of the financial statements of Monroe Paper Products Company for the year ending June 30, 1954, and to report thereon to the Board of Directors.
>
> "Our examination will be made in accordance with generally accepted auditing standards and, accordingly, will include such tests of the accounting records and such other auditing procedures as we consider necessary in the circumstances. The primary purpose of the examination is to enable us to form an opinion as to the financial position of the Company at June 30, 1954, and the results of operations for the year. As a detailed check of the day-to-day transactions is not contemplated, you will appreciate that you must rely on adequate methods of internal check and control as your principal safeguard against irregularities which a test examination may not disclose * * *"

Raney approved this arrangement on June 29, 1954.

Sempliner displayed considerable knowledge of accounting procedure; the restrictions which he insisted should be placed upon the services of Peat, Marwick were intentional and purposeful. It is not clear whether Kinsey, Fein-

berg and the other Directors fully appreciated the significance of the rigid restrictions placed upon Peat, Marwick. A partner of Peat, Marwick testified to the effect that these limitations would have upon the value of the audit; he did not understand that his firm had any responsibility of determining whether the figures on the books were properly reflected in the Moss balance sheet; this partner had little connection with the actual preparation of the report that was ultimately submitted. Later, at the suggestion of the Court, an employee who had direct charge of the work was called as a witness. Examination of this witness by the Court disclosed that he knew very little about the individual items. At the time the audit was made, part of the records were at the Company's office, and part at Moss's office. The witness had from time to time consulted with Moss, as he stated, for the purpose of getting background. He attempted to make a spot check limited solely to the year 1954; this was of no value, for much important information was not available. Raney refused to permit the Peat, Marwick representatives to investigate important records, and never permitted the accountants to get a complete verification of creditors' claims. Representatives of Peat, Marwick disagreed with Raney as to the pricing of large portions of the Inventory, which a casual observation disclosed was greatly deteriorated.

The limitations placed upon Peat, Marwick constitute a part of the conspiracy to conceal the Defendants' wrongdoing. It may be that the Peat, Marwick firm is entitled to some compensation. Certainly, Monroe or its Stockholders should not be required to pay for this service.

The [illegible]rtified Peat, Marwick report was delivered September [illegible]1, 1954. The letter of transmittal is dated August 20, 1954, and the following quotations from this letter of transmittal are pertinent.

> "(1) Certain records of earlier years, especially those relating to cost of sales for the fiscal year 1953 and the inventories at the close of that year were not made available to us.
>
> "(2) On instructions from an official of the Company, we were not permitted to communicate with

certain creditors for confirmation of balances on trade accounts payable as shown by the books.

"(3) Capital stock records were not made available for our inspection.

"(4) Minutes of directors meetings held subsequent to January 27, 1954, were not available for review.

"In addition, the management has declined to furnish us with letters of information regarding inventories, purchase commitments, direct and contingent liabilties and assets pledged (if any), which are customarily obtained as a standard auditing procedure.

"Figures appearing in this report and appended financial statements pertaining to fiscal year 1954 are subject to the foregoing and following commerts; figures for fiscal year 1953 have been included for comparative purposes only, and were adapted from such records as were made available to us and incoprorated without confirmation or examination."

"We were present at the inventory-taking as of July 2, 1954. No formal written instructions were issued by the management regarding procedures and preparation for inventory-taking and we observed that numerous estimates of quantities were necessary because of the methods used in storing and handling materials, as well as the fact that operations continued in certain departments during the period of inventory-taking. The correctness of the quantities as listed by company employees on the inventory sheets or tags, is therefore dependent in many instances upon the accuracy of the aforementioned estimates. We were, however, able to make tests of the physical existence of the quantities of numerous items selected by us. We tested the basis of pricing of the inventory and in all pertinent discussions have been advised by management that the apparent deterioration of certain materials and products did not affect their use in the manufacture of other products, and that no loss in utility had or would occur. A technical representative of a stockholder of the company was also

> in attendance for a time during the inventory-taking and has expressed the opinion that a substantial loss from deterioration of certain of the waste paper stock and manufactured rolls was a distinct possibility. In view of the technical questions involved with respect to condition, and valuation of the inventory as of June 30, 1954, and because of our earlier comments regarding the non-availability to us of certain records pertaining to the inventory at the beginning of the year, as well as the unwillingness on the part of management to furnish us with a letter of information regarding the inventory as of June 30, 1954, we are not in a position to pass upon the valuation of the inventory as a whole."

During the course of the trial the unsatisfactory condition of the Moss reports became evident. Because of the limitations placed upon their work, the Peat, Marwick report was also unsatisfactory. Thereupon, the Court suggested that an independent auditor with special qualifications for locating irregularities and discrepancies in corporate records be selected to make a complete investigation. The Court recommended Clarence H, Johnson, a Certified Public Accountant, who had satisfactorily performed similar services for the Court in other cases. The Plaintiffs' attorneys approved of this plan. The Defendants' Attorneys disapproved. The reason for their disapproval is obvious. Thereupon, the Court announced that if Johnson was called as a witness he would have to appear as a witness for the party who called him.

Plaintiffs' attorneys did engage Johnson to make a limited investigation. During the short time he worked Johnson discovered a number of items which obviously required close scrutiny. Illustrative of the type of information that can be secured in this type of an investigation was an invoice for a "victory celebration" given by the Defendants for the purpose of showing their gratitude to the people who had assisted them in winning the election at the annual Stockholders' meeting on September 23, 1953. There are three (3) items listed on the bill:

| | |
|---|---|
| Restaurant | $199.30 |
| Bar | 127.55 |
| Tips | 25.00 |
| | $351.85 |

Raney directed Blum to pay the bill with Company funds.

About 30 people attended this "victory celebration." Holefca and Boudinet were the only witnesses who testified with reference to this party. They stated that they had only one drink at the bar. There is no evidence that anyone on behalf of the Company made any effort to determine the reasonableness of this bill.

This was not an obligation of Monroe and it should not have been paid. The Plaintiffs' attorneys knew about this party, but were unable to locate the invoice. Johnson located it. The amount of money involved is not large, but if a sufficient number of such claims are to pass unnoticed, they can ruin an otherwise prosperous business. It seems probable that if Johnson could locate irregularities in the short time he worked, if a complete study of the Company's books could be made it would disclose other items of a similar nature.

All of the information continued in the Johnson report is based upon records that are in evidence. However this report was helpful to the Court because it segregated some of the questionable expenditures made of the Company's funds.

The tabulation of the Directors' fees paid, disclose that Directors had received payments for meetings that they had not attended because no such meetings were held. In order to discover this diversion of funds, it was necessary to examine the minutes of the Directors' meetings. The report for September, 1953, did disclose that the amount charged to Directors' fees was $60 in excess of the amount that should be required for this purpose. It was not until he testified on May 12, 1954, that it was disclosed that Moynihan received this $60 for a meeting which he did not attend because at the time the meeting was held he was no longer a Director. It was not until this time that it was discovered that Moynihan had also received dividends from stock which he did not own.

The report listed some of the items of expense incurred by Francis while taking depositions. Illustrations of these are the Depositions of Kinsey and Kunkel, which constituted mainly investigations of the private affairs of these witnesses and their associates. It is not claimed that either Kinsey or Kunkel profited at the expense of the Company. The information disclosed was of no benefit to the Company. Company funds would not priperly be used to pay such expenses.

The report further disclosed that the Directors' fees for the month of August, 1953, amounted to $1,080. There was no emergency connected with any of the minor matters discussed that related to the business of the Company which would require three meetings. Sempliner in his testimony, conceded that no questions of policy were discussed at these meetings. The principal purpose for having extra meetings that month was to promote the private interests of the Defendants in their attempts to control the Stockholders' Meeting to be held on September 23, 1953.

A complete investigation of the Company's records should disclose what became of the $385,769.28 decrease in the quick assets between June 30, 1953, and June 30, 1954. Such a study should throw additional light on the reason for the decrease in profits before Income Tax of $255,173.30 between the year ending June 30, 1953, and the year ending June 30, 1954. Boudinet, who was familiar with the operations of other competing paper companies in the Monroe area, could think of no plausible reason for this sharp decrease in profits. The Court would not be performing its proper function if it did not retain jurisdiction for such a further examination.

A questionable item that Johnson did not discover because he did not examine these records was disclosed in Feinberg's deposition of March 5, 1954.

Question by Francis:

> "Well, how do you reconcile the fact that you voted for a bonus of $7,000.00 for the management in 1953, after Mr. Groesbeck's death?"

Answer by Feinberg:

> "I can explain that very easily. $2000 of that was

supposed to reimburse Mr. Raney that he had supposedly spent with Groesbeck in Florida the previous winter."

As this record disclosed, Groesbeck left a substantial estate. There is no reason to believe he intended that the Monroe stockholders should be required to pay any part of the expense of a pleasure trip taken by him in Florida. There is no evidence to support Raney's claim that he spent $2000 for this purpose.

Plaintiffs have established that after Raney placed himself under obligation to Sandroff, because of the funds Sandroff furnished for the Escrow Arrangement, that the purchase of waste paper from companies controlled by Sandroff increased beyond the needs of Monroe. They have also established that some of this waste paper was of inferior quality and the prices were excessive. An attempt was made by the Plaintiffs' attorneys to take Sandroff's deposition and examine the records of his companies. This turned out to be a difficult and unsatisfactory operation. It may be that a complete investigation would disclose that the funds furnished by Sandroff were in effect the property of Monroe. In view of the fact that the Defendants had co-mingled the supplies received from Sandroff with other supplies and that much of the material was consumed in manufacturing, it is not easy to check this part of the Defendants' transactions. Much of the waste paper which Sandroff sold to the Defendants was consigned directly to Monroe from the parties from whom Sandroff purchased it. A spot check made by the accountant investigator at the source of these shipments for the purpose of verifying weights and quality might furnish information as to other irregularities and thus be justified.

46. Since 1940, W. E. Moss has had general supervision of the bookkeeping and record system of the Company. He was paid regular compensation at the rate of $250.00 a month, plus $2,000.00 for the preparation of the Annual Report; additional charges were made for special services. The By-laws provide that the Secretary-Treasurer shall be responsible for such records, but Blum never performed

this duty and knew little about such records. In effect, Moss was the bookkeeper.

The manner in which the accounts and records were kept and the way monthly and annual reports were made facilitated the carrying out of the conspiracy and the concealment of the resultant damage to the Company.

Moss did not make a Certified Audit of the Company's books. The inventory was not taken or supervised by him, and he did not know whether the 1954 inventory was taken at Cost or Market. He never checked the records of purchases of waste paper, nor attempted creditor verification of Accounts Payable, nor debtor verification of Accounts Receivable. He accepted all of the expense figures shown on the books, and made no attempt to determine whether items so listed were legitimate expenses of the Company, or were expenditures made on behalf of the individual Directors, and did not report any suspicious illegal use of the Company's assets. The ledger accounts relating to Cash, Fixed Assets, Depreciation Reserves, Accounts Payable, Accounts Receivable, and Administration and Sales Expenses, consisted entirely of posted totals. Important information as to improvements, replacements and additions to Capital assets and with regard to depreciation were not recorded on the books of the Company, but could only be obtained from work sheets prepared and retained by him. These limited services so rendered by the accountant were in accordance with Raney's desires.

The report which Knapp included with his letter of September 5, 1953, was prepared by Moss. It was not certified by "an independent public accountant." It was not the type of report required by the Securities Act of 1933.

The ledger sheet of Accounts Payable for each of the years ending June 30, 1953, and June 30, 1954, begin with the entry of the actual amount of Accounts Payable at the end of the preceding year. No entry of subsequent Accounts Payable was made in the Journal or posted to the ledger sheets as they were incurred. The only postings to such sheets were monthly debits for the total amounts of accounts actually paid during the month, also in each month the amount of such posted debits was balanced by a posted credit equal thereto, leaving the amount of Ac-

counts Payable at the original figure which thus remained constant until the end of the last month of the year when the amount owing was adjusted to show a liability for the actual amount then owing. Because of this method of keeping the records, it was impossible to determine from the monthly accounts whether the plant was operating at a profit or a loss.

Raney testified that as the operating head of the plant he made no use of the Moss reports, for the reason that too many of them were based upon estimates. He considered the charge to depreciation to be mere bookkeeping entries as they bore little relation to the actual accrued depreciation.

The constant used for the 1953 Accounts Payable was $42,371.96, but the actual amount of Accounts payable at the end of the year June 30, 1953, was $76,993.97. The constant used for the 1954 Accounts Payable was $76,-992.97, but the actual amount of Accounts Payable at the end of the year, June 30, 1954, was $128,994.46. $44,000 of the Accounts Payable at this time was for purchases from waste paper suppliers.

Throughout the Pre-trial discovery proceedings, and the Trial, it has been extremely difficult for the Plaintiffs to secure evidence, for the reason that all of the records required for this purpose were under the control of the Defendants. As it is not an uncommon experience in cases of this kind, the Defendants were reluctant to disclose records that would establish their wrongdoing.

Although a separate Accounts Receivable ledger showing each of the receivables was kept, no Accounts Payable ledger was kept; consequently, there was no account carried under the name of any supplier. This made it extremely difficult for the Plaintiffs to establish the facts necessary to determine the amount and quality of waste paper purchased since July, 1953, or the prices paid therefor. The constant amount of Accounts Payable shown in this ledger was not fairly representative. The only means by which the actual amount of Accounts Payable could be identified was by examination of the numerous Accounts Payable files, in alphabetical order, and the only way the amount of Accounts Payable could be determined

at any time other than the beginning or end of the year was by examination of these files which contained the invoices and related papers. Upon Invoices being made in full, they were transferred to closed files, thus leaving the unpaid invoices in the open files. Once an invoice was placed in a closed file it became part of about 2,000 similar invoices which would have to be checked in order to determine or check the amount of unpaid Accounts Payable at any particular time. It would take an auditor of unusual ability to unscramble this volume of invoices and properly check and analyze them. It was thus fairly easy for the Defendants to conceal improper expenditures.

During the discovery examination, Raney testified that the Company had no inventory records or inventory account; that he did not know how the 1952 and 1953 inventories had been priced; that except at the end of the year the Company had no record of what inventory was on hand, and had no breakdown of the 1953 inventory, but that the accountant had such records in his possession.

Trial herein began on October 12, 1954. On November 3, 1954, Plaintiffs' counsel requested the attendance of the accountant and production of the Company records relating to the 1953 and 1954 inventories. The accountant was away, but Plaintiffs' counsel was assured that all Company records and papers would be produced without subpoena. On November 12, 1954, the accountant testified as a defense witness as to the Company bookkeeping and annual reports. In the course of his cross-examination, Plaintiffs' counsel directed attention to the non-production of the inventory papers, and continued to repeat his request for the original inventory sheets and summaries thereof. The accountant testified that he did not have possession of such papers since August or September, 1954, having turned the inventory sheets over to Raney. During such cross-examination, the accountant disclosed, for the first time, that certain "auxiliary books" were kept in the Company's office, including a book in which each invoice for waste paper and other materials purchased by the Company and all paper stock consumed in production, are entered chronologically, but no postings are made from this

book to the ledger sheets for Accounts Payable or Inventory. The accountant testified that he never checked these records nor examined them, except in isolated cases, and not in recent years, they having no significance whatever for the purpose of his method of accounting. He further testified that from these auxiliary records it would be possible to determine at any time what the inventory should be. On November 23, 1954, there were produced the inventory summary sheets of the 1953 and 1954 inventories, but none of the supporting inventory sheets. Kirby, one of the important salaried employees of the Company, who actively assisted the Defendants in their conspiracy, had supervised the taking of a large part of the 1954 inventory. He later testified that the supporting sheets for this inventory were destroyed by him.

In 1953 and 1954, except for the months of June, it was the accountant's practice to prepare a monthly report containing an asset and liability Balance Sheet, and a Profit and Loss Statement. The assets included "Inventories (at cost)," and "Property and Reserve for Depreciation." The liabilities included "Accounts Payable and Accrued Expenses", shown in a single amount only. Net worth was shown in two items, "Capital Stock" and "Capital and Earned Surplus." The reports stated that they were "prepared from books, records and information furnished, without complete audit."

As a matter of fact, the inventory figures shown in the monthly reports did not reflect the amount shown on the inventory ledger sheet, but was an estimate by the accountant and bore no relation to what the actual inventory was. For example, the inventory shown in the July 31, 1954, report was $530,698.52, whereas the ledger showed inventory at $575,925.81 on that date. The $530,698.52 was arrived at by taking the previous year end inventory figure of $502,235.57, adding to it "some" of the ledger figures for manufacturing expenses, deducting certain items for coal consumption, fuel and gasoline and cost of sales, leaving a balance as the inventory figure. This was accomplished by the making of certain "journal entries" that were not placed on the books until the end of the year. Without access to the unrecorded data, which was

kept only in the accountant's files, one could not tell how much was based on the books, and how much was based on memoranda, estimates, etc. The auxiliary records of purchases of materials and of cost of production were not used in determining the monthly inventory figure, but the accountant used a cost formula, varying as to each department, based on the experience of the preceding year. He did not know the actual amount of material used. His figures as to inventory, manufacturing expenses and cost of sales were only estimates.

Distribution of the monthly reports to the Directors was by Raney. It was not until November 26, 1954, that the accountant's testimony disclosed that each month during the year ending June 30, 1954, he prepared and furnished Raney another form of typewritten "strip report" on printed forms, consisting of a Balance Sheet, condensed Profit and Loss Statement, Selling and Administrative expense, Monthly Labor Distribution, Manufacturing Expenses as to Each Department, Truck Operations, Gross, Net and Cost of Sales and Profit Per Ton. These figures were shown by the month and cumulatively. The accountant retained his handwritten work sheets on the same printed form. He was reluctant to part with them even for temporary study by Plaintiffs' counsel, claiming that they were his and that they were the same as the monthly reports. In the strip reports he used constant amounts (for 11 months of the year), based on the prior year's Accounts Payable, Depreciation, Property Taxes, Insurance, Legal and Accounting, Cost of Felts and of Sales and Bonuses. He did not know the cost of production of rolls, and paid no attention as to what percentage of the various types of paper was used in the production of corrugated boxes. He testified that it was impossible to tell how much kraft was used in the production of rolls. He discussed his estimates each month with Raney.

The accountant's objection to his release of strip reports was overruled by the Court, and it was not until then that the Plaintiffs' attorneys were given an opportunity to examine them. A comparison of these strip reports with the monthly reports furnished to the Directors disclosed numerous discrepancies.

In the March, 1954, strip report, several of the departments showed losses for the month, indicated in red. The total operating profit for the month was originally shown at $4,379.62, less other deductions, showing a net profit of $659.16, but these figures were adjusted upwards to $13,479.62 operating profit and a net profit of $5,027.16. These unadjusted figures appear on the typewritten copy of the strip report given to Raney, but the monthly report furnished to Raney for distribution to the Directors shows the adjusted figures without disclosing the fact of adjustment. This adjustment was accomplished by reducing the amount of materials used by $7,100, and by reducing the amount of administrative expense by the arbitrary figure of $2,000. These adjustments were distributed on the strip report to the various departments, with the result, among others, that the Corrugated Box Department, which the records indicated disclosed a loss of $3,283.49 for the month, was by thus juggling the figures made to show a profit of $1,561.51.

At the end of each year after 1940 the cost of all Fixed Assets purchased by the Company during the year was debited to the Property Account in a lump amount. The Company's books did not record any breakdown of such assets nor can it be determined therefrom when any particular asset was acquired, disposed of or charged off. Beginning in 1941, a Straight-line Annual Depreciation equal to 10% of the original cost of all Fixed Assets shown on the books was credited on the books as A Reserve of Depreciation and, each year a lump amount, equal to the total cost of the assets for which 100% depreciation reserve had been thus credited was charged against the Fixed Asset Account and a like amount was debited to the Reserve for Depreciation, reducing the reserve accordingly. In other words, the books no longer reflected the fully depreciated assets nor any depreciation reserve therefor. A large fire loss affecting fixed assets occurred in 1948 which resulted in the Company receiving $156,000 from the insurer. Of this amount $30,000 was expended in replacements and the remaining $126,00 was charged off against the fixed assets account. It is impossible from the books to determine which fixed assets were thus charged off or

the cost of depreciated value thereof or whether any of such items or part thereof remained in the Asset Account. The Company books showed the net amount of Fixed Assets, December 31, 1940, at $735,844.83 and on June 30, 1954, the Fixed Assets were shown at $1,999,019.67, and Reserve for Depreciation was shown as $995,438.38, which latter figures do not include over $1,000,000 of cost of fully depreciated assets previously written off nor an equal amount charged to Depreciation Reserve and deducted therefrom when said assets were written off. Items of improvements, additions or replacements or items having a useful life less than that at which depreciation was computed, thus charged to the Property Account as fixed assets, were not and are not segregated or separately identifiable on the books, nor is the original cost thereof nor the amount of applicable depreciation reserve that was set up or charged off ascertainable therefrom.

As early as 1946, Raney had informed the Stockholders and Directors that it would be necessary to spend large sums to rehabilitate the plant. At that time a resolution was adopted that a reserve of $200,000 be established to be increased from time to time for the purpose of rehabilitation of plant, building, equipment, and machinery. In 1947, $300,000 was set aside for this purpose. In 1948, $430,000. On May 16, 1948, the fire occurred and an additional $200,000 was allocated to the reserve. There is no evidence that any funds have been added to the Reserve for Depreciation since 1948, although as of June 30, 1954, the depreciation accrued was shown as $995,438.38.

47. In October, 1952, Raney employed Dan S. Holefca, a pension plan counselor, to procure bids from insurance companies; analyze plans of competitors; and design a pension plan for Raney's use in labor-union negotiations concerning the hourly-rated employees of Monroe. Holefca was not a lawyer, but an attorney retained by him shared and office and gave him counsel, which Holefca indirectly passed on to his clients.

On January 14, 1953, Holefca's report was submitted, together with his bill for $418.00 which was paid on that date. Holefca then mentioned to Raney the matter of a pension plan for the administrative employees of Monroe

and Holefca was engaged to prepare such a plan for a fee of $300. He furnished the latter plan on April 30, 1953, and received his fee on June 23, 1953. On June 26, 1953, the Board tabled the plan and Holefca was so informed.

About July 1, 1953, the union made a demand on Monroe for a pension plan for hourly-rated employees. Raney requested Holefca to assist him in the negotiations on the previous basis of compensation and from that time on Holefca carried on the negotiations. The plan was entered into January 26, 1954, retroactive to September 15, 1953, and was approved by the Board on February 25, 1954. The plan involved the issuance of an insurance company policy to Monroe, negotiated by Holefca, covering the pension benefits. In April, 1954, the union requested clarification on two points of the plan and through Holefca's services an agreement was reached thereon on May 1, 1954. There is no evidence that Sempliner assisted Holefca other than to consult with him as a Director.

Raney knew that whomever he designated to place the insurance coverage on the pension plans would be paid a large commission by the insurer, Holefca has received such commissions.

Notwithstanding that Raney knew that the Board had postponed consideration of a pension plan for salaried employees on June 26, 1953, on August 28, 1953, he posted a notice to office and salaried employees informing them that they would receive whatever pension benefits the non-salaried employees would receive as a result of the new union contract. At this time some of these employees were soliciting proxies for Raney.

The matter of a pension plan for salaried employees was again discussed at a Board meeting held January 27, 1954. Action was postponed to the next Board meeting for the purpose of getting additional information. On January 29, 1954, after protest by other Directors, Raney posted a notice to the salaried employees that the plan involved in August, 1953, notice was not approved by the Board. Subsequently at the meeting of February 25, 1954, the pension plan for salaried employees was tabled, and salary increases were granted to those employees retroactive to September 15, 1953.

Raney knew that he and Blum were very close to the age at which many employers compel their executives to retire and make way for more aggressive and up-to-date leadership. He also knew that some of the salaried employees who had cooperated with him in gaining and retaining control of the corporation had passed or were about to reach normal retirement age. Hence, he encouraged Holefca to continue to work on a pension plan for him, Blum and the other salaried employees. Holefca orally informed Raney that his bill for the union negotiations was $3,000. Raney told him that he knew that he had earned the money, but could not guarantee that it would be paid. He told Holefca he would have to have faith in him. Holefca assured Raney that he would make no charge for the salaried employees' pension plan.

A document incorporating Holefca's plan was prepared by the attorney sharing an office with Holefca. Raney authorized the payment of $1,440.00 to this attorney for his services. On June 29, 1954, the plan was signed for Monroe by Knapp and Blum and by Raney's secretary, Guettler, as Trustee. It provided for a pension of $450 per month for Raney and $200 for Blum, if they elected to retire at 65. Raney became 65 in September, 1954, and Blum was 65 on July 15, 1955. The plan made provisions for substantial pensions and other benefits for the salaried employees associated with Raney. However, the benefits provided for the other employees could not compare with the benefits Raney secured for himself.

If Monroe is obligated to carry out this plan, it will have a substantial effect on the financial status of Monroe. No reference was made to this matter in Moss's report of June 30, 1954. The provisions for Raney and Blum are a part of the insurance contract covering all of the salaried employees. A disproportionate cost of this contract is allocated to Raney and Blum because of their ages and the fact that they will be eligible to retire so soon and receive such substantial benefits. If Raney were to purchase an annuity giving him substantially the same benefits that he would receive from this plan, it would cost approximately $70,000. A similar annuity would cost Blum approximately $54,000.

The matter of pensions for Raney and Blum were never discussed at a Stockholders' meeting prior to September 23, 1953. It is unlikely that the Stockholders who gave Raney and Blum their proxies and later joined in the Voting Trust arrangements on the theory that it was necessary to continue the present management would have done so if they had known these officers were at that very time arranging for a pension at Monroe's expense so that they could retire almost immediately.

The pension contract in so far as it related to Raney and Blum is unfair to the Stockholders. No attempt was made to justify it. Monroe is entitled to recover from the Defendants the amount the Company is obligated to pay for such pensions, less any contributions Raney and Blum have made or will make during the time they continue to be employed by Monroe.

It is impossible on the basis of the present record to fix the exact amount the corporation is entitled to recover because of this pension agreement and this matter will be reserved for futher consideration.

48. Raney had customarily negotiated union-labor contract which normally resulted in adopting the same weekly rates as were paid by other local competing paper companies. He reported from time to time to the Directors as to such negotiations. Monroe had not kept pace with the competing companies with reference to pensions for such non-salaried employees. Holefca took care of these negotiations.

On August 25, when Raney apparently considered that he had need of the votes of the Sempliner stock to control the Annual Meeting, he wrote Sempliner requesting him to assist in negotiations with the Union. He did not report to his fellow Directors that he had done this. After Sempliner was elected Director, he and an employee of Monroe met the Union representatives, then advised Raney that he should grant the adjustment requested in order to make the pay conform to that of competing paper companies. Raney so reported to the Directors on October 13, 1953, but did not disclose that Sempliner was involved in this negotiation. On September 22, 1954, Raney was authorized

to continue negotiations with the Union. At the same meeting an invoice dated September 9, 1954, from the law firm of Stanton, Sempliner, Dewey & Knight, of which Sempliner was a member, covering professional services consisting of $750 for services relative to the AFL teamsters matter, $475 relative to the pensions trust and $100 unitemized out-of-pocket expenses, a total of $1,325, was approved by Raney and presented for consideration. Raney reported that Sempliner had done the work for the Company and on his motion the payment was authorized. Sempliner refrained from voting on this matter.

Upon his examination as a witness, Sempliner objected to explaining what became of the $1,325 on the ground that it was a privileged matter involving the operation of his law office. Upon his objection being overruled, he testified that the check was received by him. He endorsed the firm's name on it in writing and then stamped it with his endorsement and deposited it in his bank account. There is no evidence that any other member of his law firm performed any service for Monroe or that any other member of the firm knew anything about the receipt of this payment. The burden of establishing that the payment of this sum of money was fair to the Corporation was upon Sempliner. He failed to establish that he rendered any service other than that which might be expected of a Director in an advisory capacity. The Corporation is entitled to recover this sum from him.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction herein as to subject matter and as to the parties.

2. Courts have recognized that corporations have become an essential part of our American economic system. In *Ashman v. Miller*, 101 F.2d 85 (CA 6,1939), the Court stated:

> "The growth of corporations and the disappearance of the individual and partnership forms of business have become so extensive and vital in our economic life, and so many artificial legal devices have been set up which serve to isolate the stockholder from

control over his investment that directors and other officers of a corporation should be held to a strict accountablity for their acts in its management."

That concept is not new. In 1889, Justice Camplin, for a unanimous court, outlined the duties of directors as follows:

> "The directors of a corporation are its agents. The entire management of corporate affairs is committed to their charge, upon the trust and confidence that they shall be cared for and managed within the limits of the powers conferred by law upon the corporation, and for the common benefit of the stockholders. They are required to act in the utmost good faith, and in accepting the office they impliedly undertake to give to the enterprise the benefit of their best care and judgment, and exercise the powers conferred solely in the interest of the corporation. They have no right to represent the corporation, in any transaction in which they are personally interested, in obtaining an advantage at the expense of the company they represent."

*Ten Eyck v. The Pontiac, Oxford & Port Austin Railroad Co.*, 74 Mich. 226.

Investors cannot be expected to invest their capital without the assurance that the corporate managers will deal fairly and honestly with them and will willingly render a complete account of their stewardship when called upon to do so.

When those in control of a corporation dissipate its assets and then employ every device which their ingenuity suggests to prevent the stockholders from discovering their delinquencies, they injure not only the stockholders of the corporation, but the general public as well. It is unreasonable to expect that the investors will underwrite the losses of a corporation if they do not have an opportunity to receive their proportionate share of the profits.

Much of the Defendant Directors' wrong-doing took place after the commencement of this action. Apparently they assumed that once they were named as Defendants in this Stockholders' derivative action, their duties as fiduciaries ceased. This is not the law. As long as they remain

in office it is their duty as Directors to protect the Stockholders' interests.

Efforts of directors to suppress evidence, so as to make it more difficult for the Court to secure information, is a violation of their fiduciary duty. A Court Trial is a fact-finding process. It is not a game in which one group of people try to outsmart another group of people, and, above all, it is not a game where people vie with one another to see how much information they can conceal.

Dilatory and evasive tactics, unfortunately still possible under our legal system, become more reprehensible when indulged in by fiduciaries. When corporate officers and directors engage in such activities as a defense against a stockholders' derivative action, they add to their culpability. Each Director has his individual responsibility to fulfill his obligation to all the stockholders. He cannot escape the responsibility by the simple expedient of refraining from voting on a proposition when he doubts the propriety of the action proposed by a fellow director. He should be loyal to his fellow directors when they are performing their duties. He has no right to permit this sense of loyalty to cause him to neglect the interests of the stockholders.

3. A voting trust is valid only if it is "for a lawful purpose." As the Defendant Voting Trustees pointed out in one of their pleadings filed in this case, they gained an advantage for themselves when they induced Monroe Stockholders to exchange their stock certificates for Voting Trust Certificates. The Directors gained this advantage for themselves as Voting Trustees to the disadvantage of the Corporation and its Stockholders.

The right to participate as a stockholder in the management of a corporation is a valuable property right. Conceivably there are situations where a stockholder could profit by surrendering such rights. But where, as here, the voting trustees are acting in a trust capacity as directors, they have a special duty to make full disclosure of all the pertinent facts which a prudent investor would require before he surrendered these voting rights.

In determining whether a voting trust is for a lawful

purpose, the court must take into consideration all of the surrounding facts and circumstances. It has been established that one of the purposes of the voting trustees in promoting this program was to continue their control of the Corporation so that their mismanagement as Directors could continue undetected. It is obvious that this purpose was not a lawful one.

The fraudulent use of the mails; the violation of the Federal and Michigan Securities Acts; the declaration of excessive dividends; the false and misleading statements made to the Stockholders; the method used to conceal records; the Escrow Arrangements; the means used to induce those doing business with the Corporation to contribute to the Escrow funds; the method used to induce employees of Monroe to work for the Defendants' private interests to the detriment of the Corporation; the manner in which the 1953 Stockholders' meeting was conducted; the fact that they failed to keep their promises made at the time they solicited proxies to vote for the re-election of Moynihan after he asserted he would vote independently; the fraudulent scheme to provide a pension for Raney and Blum so that they might retire almost immediately are all indicative of the Defendants' desire to promote their own interests to the detriment of the Corporation and its Stockholders.

In *Ashman v. Miller*, supra, the Court stated:

> "If two inferences may be drawn from the conduct of the directors in procuring for themselves the voting trust certificates, one without damage to the (corporation) and the other with it, the latter, rather than the former, will be drawn, because of the relationship of the parties."

Here, no inference is needed. The conduct of the Defendant Directors prior to the Voting Trust arrangement and the illegality of the procedure adopted for carrying out that arrangement lead inescapably to the conclusion that the purpose of the Defendant Directors' conspiracy was to maintain control of Monroe and prevent detection of their fraud and misamanagement. The Corporation and its innocent Stockholders will suffer irreparable injury if this Voting Trust is not rendered ineffective. The Voting Trust

agreements were not fair to the Stockholders who entered into them and they are not fair to the other Stockholders whose interests have been adversely affected by this arrangement. The Voting Trust certificates are void.

4. The Federal Securities Acts and the Michigan Blue Sky Law were not intended to deprive investors of any rights that they had at the time that the laws were enacted. These laws were enacted because the law-makers wished to protect the public interest. The agencies created to enforce these laws were established because the law-makers realized that the public interest needed protection. Voting Trust certificates are "securities" within the meaning of these laws.

The Defendant Directors-Voting Trustees were notified by top executive employees of the Securities and Exchange Commission as early as February, 1954, that they had violated the Securities Act of 1933 when they failed to register the Voting Trust Certificates and file a prospectus in a form approved by the Commission. The law-makers considered this a serious matter. They decreed that non-compliance with these laws would constitute a criminal offense. The misrepresentation made by the Defendant Voting Trustees and their attorneys to the members of the Commission which caused the Commission to refrain from enforcing the law was an important part of the conspiracy established in this case. Much of the damage that the Corporation sustained occurred subsequent to February, 1954. Thus it appears that not only was the Voting Trust created for an unlawful purpose but further that it was promoted in violation of the laws of the United States and the State of Michigan.

5. One who joins a conspiracy after it has been formed is liable for acts done prior to his joining and until he abandons the conspiracy. *Jackson v. Smith*, 254 U.S. 586; *Irving Trust Co. v. Deutsch*, 73 F. 2d 121 (CA 2, 1934). It follows, therefore, that Monroe is entitled to a joint and several judgment against Defendant Huber as well as against Defendants Knapp, Raney, Blum, Leathers and Sempliner for all damages sustained as a result of the conspiracy.

6. The Defendant had the burden of showing that the bonuses paid to Raney and Blum were fair to the Corporation and not merely a convenient method for absorbing the corporate profits. They have failed to do so.

7. No evidence was offered to justify the payment to Raney of $2,000 for expenses alleged to have incurred in Florida.

8. Although Knapp, Raney and Blum did perform some services for the Corporation during the fiscal year ending June 30, 1955, their primary activities throughout this period were in promoting their own interest. This Court is mindful of the decisions which have allowed directors similarly situated to recover the reasonable value of their services even though their salary agreements were void. The theory behind a quantum meruit recovery is that the law will not tolerate the unjust enrichment of one party at the expense of another. The burden of establishing the reasonable value of the services rendered for the Company by Knapp, Raney and Blum was upon the Defendants and they have failed to offer any evidence upon which the Court can make a determination as to the value of their services for the time they spent in the interests of the Corporation. In the absence of such proof, the Court can do no less than hold the Defendants liable to the Corporation for the total amount of salaries received by Knapp, Raney and Blum during the period from July 1, 1953, to June 30, 1955. *McKey v. Swenson*, 232 Mich. 505 (1925).

9. It appears that Raney and Blum are to reap disproportionate benefits from the pension plan and this Court would be remiss in its duty if it permitted them to continue to unjustly enrich themselves at the Corporation's expense through the medium of a plan that they designed and approved. The burden of showing that the plan is fair to the Corporation was upon the Defendants. They did not sustain that burden.

10. The Defendants have failed to justify the payment to Sempliner of $1,325 of the Corporation's money.

11. The directors of a corporation have no right to use the funds of the corporation to defend themselves against legitimate charges of wrong-doing or to obtain legal advice as to how they might perpetuate themselves in office so as to continue their mismanagement. They have no right to use corporate funds to pay expenses incurred in attempts to induce public officials to refrain from enforcing laws enacted to protect investors. It follows that the Corporation is not liable for expenses incurred by the Defendant Directors for their defense in this litigation or for the legal services rendered by Francis and Weipert in connection with the proxy campaign, the Escrow purchases and the Voting Trust arrangement. The Defendant Directors had no right to reimburse Francis with corporate funds for the expenses he incurred while attending the hearing before the Securities and Exchange Commission in August, 1954.

12. The services of the Clark, Klein, Brucker and Waples law firm in connection with the proxy forms and the Annual Meeting were also rendered for the personal benefit of the Defendants and should not have been charged to the Corporation.

13. The Defendant Directors have expended $4,249.88 of Monroe's money in payment for stenographic fees in connection with this litigation. There is no more authority for such an expenditure than there is for the payment of attorneys' fees.

14. It is possible that the methods used by Moss, under Raney's direction, in keeping the books of the Corporation required more time than would be normally required in keeping them according to approved bookkeeping methods. However, this was not a service to the Corporation; it was a disservice. The payments made to Moss exceed the value of such services in the amount of $4,000.

15. The Lloyd-Thomas appraisel was ordered as a part of the Defendants' conspiracy. The actual report was not received until January 4, 1954. The valuation figure used in all of the propoganda, including the Huber letter of December 31, 1953, sent to the Stockholders, was based

upon the off-hand guess made by Reihmer. This estimate was secured by Raney for the benefit of the Defendants and the expenses incurred should not have been charged to the Corporation.

16. The Defendants had no right to use corporate funds to defray the cost of telephone calls, telegrams, postage, printing, and advertising incurred in furtherance of the proxy, National Container Corporation and Voting Trust Programs.

17. The expenses incurred in connection with the Victory Celebration party were for the benefit of the Defendants and their friends and not for the good of the Corporation.

18. The Court in *Ashman v. Miller,* supra stated:

> "It is too plain for citation of authority that a director of a corporation cannot barter or sell his official discretion or enter into any contract whatever that will in any way restrict or limit the free exercise of his judgment and discretion in his official capacity, nor can he place himself under any direct and powerful inducement to disregard his duty to the corporation and its stockholders in the management of corporate affairs."

By placing himself under obligation to Sandroff, Raney was no longer in a position to deal at arms-length with reference to the purchase of waste paper. It is likely that Monroe suffered damages considerably in excess of the amount that Plaintiffs' attorneys were able to establish by the best evidence available. The Company is entitled to recover the sum of $78,079.40 for this item.

19. The Defendants have not rendered the kind of accounting that fiduciaries in their positions are required to furnish. They have obstructed the efforts of Plaintiffs' attorneys and the Court's efforts to secure such information. Their failure to present current and complete records for inspection has made it impossible to determine the exact amount of damage the Corporation has suffered to date. It is the view of the Court that it is the duty of the Plaintiffs' attorneys to employ an accountant especially quali-

fied for such service to investigate all of the questionable transactions which have occurred since the Defendants gained control of the Corporation in order that the Corporation may be fully compensated for all of the damages it has suffered at the Defendants' hands.

20. Under these circumstances, the Court is compelled to rely upon the best information available in this connection. It is proper to take into account the unexplained decrease in quick assets during the fiscal year ending June 30, 1954, while the Defendants were in control of the Corporation. On June 30, 1953, these assets amounted to $725,811.66. On June 30, 1954, they amounted to $345,042.38. It is likewise necessary to take into account the unexplained decrease in profits before income taxes for the same period. Profits for the fiscal year ending June 30, 1953, were $449,485.27. Profits for the fiscal year ending June 30, 1954, were $193,712.88.

21. The items of damage specifically allowed in the judgment are not conclusive of the Corporation's right to enforce any and all liability of the Defendants and any of them for other additional misuse of Company assets, property, funds, credit or facilities or loss, damage, or expense caused by other or additional violations of their fiduciary duties. The judgment in this case is final only as to those items specifically listed herein.

The matter of costs will be reserved until the final termination of these proceedings.

# No. 12676
# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

Burton S. Knapp, et al., *Appellants*,
v
John P. Kinsey, et al., *Appellees*.

Appeal from the District Court of the United States District of Michigan, Southern Division.

(Decided and Filed May 1, 1956)

(232 F 2d 458)

Before Simons, Chief Judge; Allen and Miller, Circuit Judges.

Miller, Circuit Judge. This is a stockholders' suit brought by John P. Kinsey, individually and as a director and stockholder of Monroe Paper Products Company, hereinafter referred to as the Monroe Company, Lawrence G. Kunkel and the Waterbury Corrugated Container Company, individually and as stockholders of the Monroe Company. It is directed against Burton S. Knapp, Charles E. Raney, George A. Blum, Don B. Leathers and Arthur W. Sempliner, individually and as directors and stockholders of the Monroe Company, and as Trustees under a Voting Trust Agreement pertaining to the stock therein; also George J. Huber, individually and as Chairman of a Stockholders' Committee, and the Monroe Company itself. It charges breach of fiduciary duties on the part of the directors, and seeks among other items of relief their removal as directors of the Company, that the Voting Trust Agreement be declared illegal, and an accounting for the loss and damage sus-

tained by the Company by reason of said violations of fiduciary duties. From a judgment favorable to the plaintiffs, the defendants Knapp, Raney, Blum, Leathers, Sempliner and Huber have appealed.

The complaint as amended was based upon allegations which can be briefly summarized as follows: The Monroe Company was incorporated as a Michigan corporation on ar about March 20, 1920 and has been engaged in the business of manufacturing paper and paper container products. Its authorized outstanding capital stock was 190,000 shares of $1.00 per value common stock. For some ten years prior to his death on March 10, 1953, Alex J. Groesbeck was the President, a director, and the largest single stockholder of the Company, and to a large extent controlled its affairs. During that period it was the policy of the Company for Groesbeck to purchase company stock on the open market at market prices on behalf of the Company and transfer the same to the Company's treasury for periodic retirement. The Company was conservatively operated, made conservative dividend payments to stockholders, and maintained substantial cash reserves.

Following Groesbeck's death, a cleavage resulted in the Board of Directors between those supporting the Groesbeck interests and those supporting the defendant Knapp. Knapp, who was a director, but had little knowledge of the Company's business, was elected President, and the defendant Raney, who was also a director, became the operating head of the Company. A fight for the control of the Company followed. On or about October 1, 1953, the Waterbury Corrugated Container Company purchased from the Groesbeck estate faction and others approximately 75,000 shares of the common stock at a price of $10.00 per share. Plaintiffs Kinsey and Kunkel were Pr- dent and Vice President respectively of Waterbury Company.

In the meantime, the Knapp faction discontinued making purchases of the Company stock for the benefit of the Company, and attempted to acquire stock for the benefit of themselves and those friendly to them. Funds were

secretly deposited in escrow by the Knapp faction with the Monroe State Savings Bank, which had previously handled stock purchases of the Company, through which 15,538 shares of the Company stock were purchased during September, October and November 1953. On October 11, 1953, the defendant, against the vote of the non-defendant directors, without disclosure of the escrow stock purchases and despite a 50% increase in the regular dividend paid September 15, 1953, passed a large unprecedented extra dividend equal to the total 1952 dividends, but withheld payment thereof until January 15, 1954, in order, as charged by the compliant, to allow themselves time to deliver the escrow stock to themselves and those friendly to them.

A stockholders' committee was formed by the defendants, which drafted a Voting Trust Agreement which gave to the defendant directors the voting control of the majority of the Company stock for five years. Company funds and Company facilities were used to solicit stockholders to submit their stock to the Voting Trust Agreement. In addition, the amended complaint charged mismanagement of the Company's affairs and unauthorized expenditures of Company funds in substantial amounts.

The compliant was filed by Kinsey, Kunkel and the Waterbury Company on February 2, 1954. As later amended it charged that the Voting Trust Certificates were not registered under the Securities Act of 1933 and had not been qualified under the Michigan Blue Sky Law; that the Voting Trust Agreement was a restraint of interstate trade and commerce prohibited by the Sherman Anti-Trust Act and the Clayton Act, and was an unlawful restraint on alienation of property contrary to the laws and public policy of the State of Michigan. It asked that the defendant directors be required to disclose information about the foregoing transactions, that the escrow agreement be declared unlawful and in violation of the fiduciary duties of the defendants, that the Voting Trust Agreement be declared unlawful and all deposits thereunder be cancelled, that the defendants be removed as directors and officers of the Company and be required

to account to the Company for the damage resulting from violations of their fiduciary duties, and that all stock of the Monroe Company purchased by the individual defendants since July 1, 1953 be cancelled and returned to the Company in accordance with a suggested formula providing for proper compensation. The material allegations were denied by the defendants, and in addition the Company and the individual defendants, except Huber, filed counterclaims, to which replies were filed, making the issues.

Shortly after the filing of the complaint, extensive discovery proceedings were conducted until October 12, 1954 when the trial was started before the Court without a jury. The trial continued until June 2, 1955. On August 4, 1955, the District Judge handed down extensive findings of fact and conclusions of law and entered a partial final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. The judgement provided that the Monroe Company recover from the defendants jointly and severally the sum of $306,982.62 with the Court reserving jurisdiction to enter additional judgments for items of damage not yet passed upon; that the defendant directors be enjoined from recognizing or carrying out the Voting Trust Agreement; that the Trustees under the Voting Trust Agreement be enjoined from voting any of the shares deposited thereunder; and that they terminate and cancel the Voting Trust Agreement and deliver all certificates for shares of stock deposited under the Agreement to the depositors thereof or their transferees. Notice of appeal was filed on August 5, 1955. The District Judge having stated in colloquy with counsel on June 2nd that he would not grant a stay, appellants made application to this Court which entered a stay order on August 12, 1955, conditional upon the execution of a supersedeas bond in the amount of $250,000. The bond was executed and filed.

This appeal has been thoroughly briefed and argued on its merits. It involves a voluminous record. In addition to the issues presented in a consideration of the merits, appellants at the outset contend that the District

Court's findings have no value, and that the judgment shoud be reversed, because of bias and prejudice on the part of the trial judge and a pre-judgment by him of important issues before trial. Our attention has been directed to many portions of the record as supporting the contention, to some of which we will refer.

One phase of this case, involving an analogous question, has recently been reviewed by us in Appeal of the United States Securities and Exchange Commission and William H. Timbers, its General Counsel, from Order Adjudicating William H. Timbers in Contempt, reported at 226 F. (2d) 501, C. A. 6th, hereinafter referred to as the *Timbers* case. The facts involved in that phase of the case are set out at length in that opinion, to which reference is now made, and will not be repeated here. Those facts furnish an important background to the question now presented.

As pointed out in the opinion in that case, much of the controversy between the District Judge and the appellants apparently arose out of the erroneous view taken by the District Judge that a part of his function was to conduct a searching inquisition into what he considered to be neglectful inaction of the Securities and Exchange Commission in relation to the Monroe Company's affairs (P. 519). The extent to which this view influenced his actions in the case is shown by the following:

Shortly after the start of the trial the District Judge wrote the District Attorney calling his attention to the charge that the defendants had sold voting trust certificates "in violation of the Securities Act" and making available for examination the file, depositions and a transcript of parts of the evidence. Counsel for the plaintiffs had brought this matter to the attention of the Securities and Exchange Commission, and the Blue Sky Commission of Michigan before institution of the suit, who investigated the matter but took no action. On October 27th the District Judge called District Attorney Kaess, SEC Attorney Rakow and all counsel in the case into his chambers, where the following occurred:

"*The Court:* Just as a coincidence, during this

period of time I am in charge of the criminal docket, and, in accordance with our local rules, I also have supervision of the Grand Jury. . . .

"Assuming that I had concluded that a crime had been committed in this community and I had called Mr. Kaess's attention to this matter and he did nothing about it, would that mean that another offense had been committed in the community by Mr. Kaess in concealing a felony? . . .

"And, of course, the same question would apply to Mr. Rakow, who, I think, knows probably more about this case than Mr. Kaess does. . . . It has been a long time since I have charged a Grand Jury, but I have a recollection that I instruct them to investigate the matters that are brought to their attention by the District Attorney and by their fellow jurors and by other parties. . . . During the months of October and November, it is right in my charge. If I have reason to suspect that an offense has been committed in the community, have I any excuse for not calling the Grand Jury's attention to it? . . . Assuming that I have informed Mr. Kaess about it and he does nothing, do I have any duty to inform the Grand Jury about Mr. Kaess's inactivity, whatever it may be?"

Counsel for the plaintiffs stated that he did not approve of the suggested procedure for the reason that the Court might conceivably be accused of trying to complicate the situation by the threat of criminal proceedings. However, the District Judge continued to inject into the picture the possibility of criminal proceedings. During the cross-examination of accountant Moss he suggested to counsel for the plaintiffs that the questions be short and not complicated or involved so that if the witness was not telling the truth the answers might form the foundation of an indictment for perjury. As shown in the *Timbers* case, supra, (p. 507) the District Judge threatened Rakow and Holden, SEC witnesses, with imprisonment for contempt. He told Rakow to report to the Commission that a grand jury could be called at any moment. He sug-

gested the possibility of indicting Paul Rowan, one of the members of the Commission, for attempting to instruct the SEC counsel how he should testify in Court. He called the District Attorney into the courtroom and inquired about his attitude toward the defendants. General Counsel Timbers was actually placed in the custody of the Marshal for contempt of Court, which order this Court reversed. He was denied a stay of execution pending appeal and applied to and obtained from the Chief Judge of this Court, who happened to be in the City at the time, such a stay while still in the custody of the Marshal. Later, the District Judge became displeased with the failure of Timbers to be present at a session of the Court. Although defense counsel pointed out the probability of a misunderstanding and that a contempt order was unnecessary to get the General Counsel of the Securities and Exchange Commission back into court, the District Judge entered an order appointing two members of the Detroit Bar to prosecute possible contempt action against him. He stated that the order would probably be enlarged to cover all the attorneys in the case.

Appellants call attention to the following incidents as indicating hostility and bias and prejudgment of the issues. Before the first witness was called the District Judge remarked that there might be another Federal statute involved, and "I am just making the observation now so you can give it some thought. I might say that this is fairly typical of the practice that is used by promoters in schemes to defraud and in violation of the Mail Fraud Statute."

In colloquy with counsel near the end of the case, the Judge said: "I wasn't in it very long, however, before I concluded that if only a portion of the charges of the plaintiff was sustained here, this was about the worst mail fraud case that I have seen, and I have had a number of them; and it was about that time that I referred the matter to the District Attorney and had the discussions with a representative of the SEC." The case is not a mail-fraud case. The Judge followed with a statement critical of the defendant directors for not being willing

to disclose all of the facts in the case, and upon defense counsel stating that he did not quite understand what the Judge was saying, the Judge replied: "I do not think you have since the beginning of this case, and I am not surprised that you do not know now." When counsel said he would rest on the record, the Judge answered: "Yes, your attitude towards the duties and obligations of trustees is apparently quite different from what I think the attitude on the basis of common morality should require, and certainly the legal obligations."

On December 7, 1954, shortly after the defense evidence started, the Judge suggested the need of having an independent auditor working directly with plaintiff counsel, although the Court would not be able to allow an attorney's fee for auditing work. He stated that normally an auditor could do a little better job of auditing than most lawyers could. In the discussion that followed, the Judge said: "Don't you think that you have assurance now of collecting enough money so that you could justify the expenditure for that kind of audit?" When plaintiffs' counsel stated that his clients were willing to advance and take their chances on reimbursement, the Judge replied: "Well, you won't have to take any chances on that. You will either recover enough money to pay this auditor, or I guess maybe I will have to pay him. I don't want him to be under any obligation to any particular stockholder." The Judge recommended a certified public accountant named Johnson, who had satisfactorily performed similar services for the Court in other cases. Johnson was appointed over defendants' objections. Defense counsel pointed out that while the parties were in the middle of a trial involving the recovery of expenditures made by the Company, the Court was appointing an auditor to be paid out of the funds recovered, thus putting the Court in the position of having to find the funds out of which to pay the auditor. Counsel contend on this review that if such funds were not made available through the result of the case, the Court might be under an obligation to personally pay the expense. The Judge stated that on the basis of the

facts that had already been conceded by the defendants, it was perfectly obvious that some of the funds of the Company had been misapplied. Counsel replied that he knew of nothing in the papers already introduced by the plaintiffs that conceded that there had been a misapplication of corporate funds. The following then occurred. "The Court: Your statement now just makes it obvious to me that you haven't studied the law relating to this type of an action. There isn't much I can do for you until you do study it. Mr. Sempliner: Well, your Honor, in view of that, I would like to withdraw our consent to all proposed findings. The Court: Well, I will not permit it."

Johnson was later called as a witness for the plaintiffs on December 29, 1954, at which time it developed that he had prepared and delivered to the Court shortly prior thereto a memorandum or document relating to the disputed issues, but which had not been shown to counsel for either plaintiffs or defendants. Defense counsel's request that it be made available to them at once so as to enable them to know what the Court was considering and to place them in a position to make any explanations or additions thereto that might appear necessary was not complied with, although the Judge stated that whatever information the witness had given him would be made available to counsel "not very much later." Plaintiffs' counsel stated that it would be introduced as an exhibit by the witness. The witness was temporarily excused and shortly thereafter recalled, at which time he filed a report identified as Exhibit No. 234, which we assume was the document in question. Johnson was recalled at a witness and further examined on March 3, 1955, at the close of which defendants began their cross-examination. The Court stated that the cross-examination would have to be completed that afternoon in order to permit Johnson to leave early the next morning for Mexico in connection with Olympic Game activities in that country. Cross-examination continued until 5:00 p.m., at which time defense counsel stated that it was long after the usual court hours and in the absence of certain books of the Company dealing with previous

years he was unable to complete the cross-examination that afternoon and would want to continue it the next morning. The following then occurred:

"The Court: You will go right ahead to-night. Mr. Sempliner: Well, your Honor, I am through for to-night. The Court: You are through for to-night? All right. Then the witness may be excused, . . . Mr. Sempliner: I would like to take exception to the Court's ruling and object." Appellants point out that although Johnson had been available as a witness for several months, their cross-examination of him was arbitrarily limited to a portion of a day and the witness excused before it was completed.

Other incidents which appellants call to our attention include the following:

The Judge stated in colloquy with counsel, before the trial was completed: "It has developed since this case started, or, since we started taking testimony, that Cook and Boudinet were active participants in the conspiracy. Unfortunately, they were not made defendants at the time the suit was started, and that is understandable." Cook and Boudinet were officers of the Monroe State Savings Bank, Boudinet being its Trust Officer. Boudinet later testified about stock deposited under the Voting Trust Agreement, following which the Judge stated: "All right, Mr. Boudinet, I want to ask you a few questions. . . . Did you understand that as late as yesterday the chief law enforcement officer for the Federal Government stated on the witness stand that he was investigating your conduct in connection with this matter?" The correctness of the statement by the Judge was challenged by defense counsel, but it was not withdrawn.

Defense witness Kirby was called out of the audience and interrogated by the Judge as to why he was present at the trial.

A witness Weipert, who was a lawyer, testified for the defendants. The judge told plaintiffs' counsel that they should not hesitate, because he was a lawyer, to attack his honesty and integrity, and that the Court intended to make a finding as to Weipert's credibility in

view of "the criminal aspects" of the case. At one point during Weipert's testimony the Judge interrupted by saying: "Let's put it frankly. Who are you trying to fool?" Weipert's request for leave to explain an answer was refused.

The Judge participated actively in the examination and cross-examination of the defendant Sempliner, who also served as attorney for the defendant directors. At one point in the cross-examination the following occurred: "The Court: What did you mean by the use of that term 'reasonable return'? Answer: A dividend policy in line with what it had been about the time they had bought it. Mr. Brand: Have you finished, your Honor? Question (By Mr. Brand): I read you what you said in your. . . . The Court (Interposing): I finished to the extent the witness didn't answer my question, but then, I am having no different experience than you are with this witness, so I decided to quit. Answer: May I try and answer your question again, your Honor, and have it read back? The Court: I prefer to have you answer it when I ask it, rather than spend some time deliberating on what you think your answer should be, so we will just let the record stand as it is." This was followed shortly thereafter by the Judge's statement: ". . . I will have to make a finding with reference to the credibility of the witnesses, an unpleasant task, but I am afraid I will have to do it."

The appellants cite the following occurrences as showing that the District Judge took an active part in assisting the plaintiffs in presenting their case and in proving their contentions.

He suggested to their counsel that they move to dismiss defendant's counterclaim. He suggested that another stockholder intervene, who had held stock for a longer period of time, which "would entirely eliminate that problem that we have of whether the expenditures were made prior to the time that Mr. Kinsey purchased his stock, wouldn't it." He raised the question if it was too late to get the bank in as a defendant, saying that it had much more to do with the promotion of the program

than Huber did and that "It might be easier to collect the judgment from the bank." In colloquy with plaintiffs' counsel, the Judge said: "I might say, Mr. Brand, that I can little by little pick up these items that I think you are under obligation, representing the stockholders, to look for . . . ; but you have well known Mr. Sempliner's attitude here for a long time; . . . that if you are going to get a judgment against the directors, you will have to dig for the stuff, they are not going to help you." This was followed a little later by: "So that I have an uncomfortable feeling that you haven't made an adequate study to give an appellate court an adequate picture of how loosely the company's money was handled." In discussing the question of damages he indicated to counsel that if a compromise offer of $160,000.00 was recommended to him, he would not approve it, and suggested the possibility of a judgment for $500,000.00.

The Judge made this suggestion to plaintiffs' counsel: ". . . Why not subpoena Mr. Rakow who had charge of it here and find out what happened, then you have an additional evidence of the violations of their fiduciary duties in that they are spending their time when they ought to be working at the plant, trying to sustain the position when they know they are legally wrong . . . Why not do it? It seems to me you are too cautious about a lot of things here."

The Judge suggested that they take the depositions of the SEC Commissioners in Washington; that they call as witnesses the SEC people in the courtroom; without having the question presented, he expressed a tentative opinion that the defense lawyers could not claim privilege if questioned about the use of company funds in the payment of legal fees; requested that defendant Sempliner be questioned about three specified matters; asked that a number of people be called as witnesses; and near the end of the trial made the remark—"Let me finish this. I am doing clean-up work for you."

Appellants' position on this appeal is reflected by counsel's statement at the close of the case when a discussion took place relative to a submission of the case and the findings and judgment. He stated to the Court: "May it

please the Court, frankly it seems to me that it would be just as well if we did not work with you from here on . . . Now, your Honor has said that you will receive briefs and hear arguments. I do not believe you need wait to do that. It is the feeling of my clients that so much was decided so long ago that we do not wish to burden the Court with any further brief in addition to what we have already filed; and that the court need not call on us for any further argument in the matter . . . so it would seem to me that the sooner a decision of some kind can be made, in form to be appealable, that the better off all parties will be."

One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. *In re Murchison*, 349 U. S. 133, 136; *Talbert* v. *Muskegon Construction Co.*, 305 Mich. 345, 348. If this basic principle is violated, the judgment must be reversed. *In re Murchison*, supra; *Berger* v. *United States*, 255 U. S. 22; *Moskun* v. *United States*, 143 F. (2d) 129, 130 C. A. 6th; *N. L. R. B.* v. *Phelps*, 136 F. (2d) 562, C. A. 5th.

Bias or prejudice on the part of a judge may exhibit itself prior to the trial by acts or statements on his part. Or it may appear during the trial by reason of the actions of the judge in the conduct of the trial. If it is known to exist before the trial it furnishes the basis for disqualification of the judge to conduct the trial. Section 144, Title 28, U. S. Code. This section provides: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." This statutory provision is not directly applicable to proceedings wherein the claimed bias or prejudice appears during the course of the trial. However, there would seem to be close analogy between bias and prejudice which would disqualify a judge from sitting in a judicial proceeding and the bias or prejudice appearing during the course of the proceedings which

would render the judgment therein invalid. The following rulings are accordingly helpful in determining what constitute bias or prejudice on the part of a judge so as to require a reversal of a judgment rendered by him.

The bias or prejudice which will disqualify a judge must be "personal" bias or prejudice as distinguished from a judicial one. *Craven* v. *United States*, 22 F. (2d) 605, 607-608, C. A. 1st, cert. denied 276 U. S. 627. It is not sufficient if the alleged bias or prejudice arises out of the judge's background and associations rather than his appraisal of the complaining party personally. *Price* v. *Johnston*, 125 F. (2d) 806, 811, C. A. 9th; *Eisler* v. *United States*, 170 F. (2d) 273, 278, C. A. D. C. Nor is it sufficient that the alleged bias or prejudice arises from the judge's view of the law, which may have been expressed by him in some prior case. *Loew's Inc.* v. *Cole*, 185 F. (2d) 641, 646, C. A. 9th; *Ferrari* v. *United States*, 169 F. (2d) 353, C. A. 9th; A judge is not disqualified merely because he believes in upholding the law, even though he says so with vehemence. *Baskin* v. *Brown*, 174 F. (2d) 391, C. A. 4th; *Foster* v. *Medina*, 170 F. (2d) 632, C. A. 2nd. Imposition of sentences which are very severe, but which are within legal limits provided by the statute, does not, standing alone, establish the necessary bias and prejudice. *Calvaresi* v. *United States*, 216 F. (2d) 891, 900, C. A. 10th. Adverse rulings during the course of the proceedings are not by themselves sufficient to establish bias and prejudice. *Ex parte American Steel Barrel Co.*, 230 U. S. 35, 44; *Refior* v. *Lansing Drop Forge Co.*, 124 F. (2d) 440, 444, C. A. 6th; *Littleton* v. *DeLashmutt*, 188 F. (2d) 973, 975, C. A. 4th, cert. denied 342 U. S. 897; *Beecher* v. *Federal Land Bank*, 153 F. (2d) 987, 988, C. A. 9th, cert. denied 328 U. S. 871, rehearing denied 329 U. S. 819. See also *In re J. P. Linahan*, 138 F. (2d) 650, C. A. 2nd.

The trial judge in the federal court is more than a mere arbitrator to rule upon objections and to instruct the jury. It is his function to conduct the trial in an orderly way with a view to eliciting the truth and to attaining justice between the parties. It is his duty to see that the issues are not obscured and that the testimony is not misunderstood. He has the right to interrogate witnesses for this purpose. *Fidelity & Deposit Co. of Maryland* v. *Bates*, 76 F. (2d)

160, 170, C. A. 8th; *Montrose Contracting Co.* v. *Westchester County,* 94 F. (2d) 580, 583, C. A. 2nd, cert. denied, 304 U. S. 561; *Lewis* v. *United States,* 11 F. (2d) 745, 747, C. A. 6th.

However, the right of the trial judge to participate in the proceedings and to interrogate witnesses is not an unlimited one. Such participation should be exercised in conformity with the standards governing the judicial office. *Quercia* v. *United States,* 289 U. S. 466, 470. The judge should exercise self-restraint and preserve an atmosphere of impartiality. *Pariser* v. *City of New York,* 146 F. (2d) 431, 433, C. A. 2nd. When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, or an unwarranted prejudgment of the merits of the case, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored. *Crowe v. Di Manno,* 225 F. (2d) 652, C. A. 1st; *In re Parkside Housing Project,* 290 Mich. 582, 598-599; *Clarke* v. *Commonwealth,* 259 Ky. 572. As said by the Supreme Court in *Berger* v. *United States,* supra, 255 U. S. 22, 35, ". . . the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment." In *In re Murchison, supra,* 349 U. S. 133, 136, the Supreme Court said . . . "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In *Whitaker* v. *McLean,* 118 F. (2d) 596, C. A. D. C. the Court said—"Hostility is a form of bias . . . The policy . . . is that the Courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial;' i.e. shall appear to be impartial . . . Often some degree of bias develops inevitably during a trial. Judges can not be forbidden to feel sympathy

or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial." In *Connelly* v. *United States District Court,* 191 F. (2d) 692, 697, C. A. 9th, the Court said — "It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial, but that there shall be such an atmosphere about the proceedings that the public will have the 'assurance' of fairness and impartiality." In *Brown* v. *Walter,* 62 F. (2d) 798, 800, C. A. 2nd, the rule was briefly summarized: "Justice does not depend upon legal dialectics so much as upon the atmosphere of the court room, and that in the end depends primarily upon the judge." Absence of the necessary "judicial calm" caused this Court in *Moskun* v. *United States,* supra, 143 F. (2d) 129 C. A. 6th, to reverse the judgment and remand the case for retrial by another judge.

In our opinion, the conduct of the District Judge did not conform to the standard required by the foregoing authorities. Whether unconsciously or otherwise, he failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled o receive. His active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain a clear understanding of what their testimony was and fully justifies appellants' complaint that at times "he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff." Although appellees' counsel did not ask or need such assistance, and apparently at times realized the possible prejudice to their cause, the prejudicial effect to appellants' rights requires a reversal of the judgment. *Appeal of United States Securities & Exchange Commission,* supra, 226 F. (2d) 501, 519, 520, C. A. 6th; *Berger* v. *United States,* supra, 255 U. S. 22; *Crowe* v. *Di Manno,* supra, 225 F. (2d) 652, 659, C. A. 1st; *Whitaker* v. *McLean,* supra, 118 F. (2d) 596, C. A. D. C.; *N. L. R. B.* v. *Phelps,* supra, 136 F. (2d) 562, C. A. 5th.

The judgment is reversed and the case remanded to the District Court for a retrial before another judge.

# No. 12676

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

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Burton S. Knapp, et al., *Appellants*,

v

John P. Kinsey, et al., *Appellees*.

Appellees' Petition for Rehearing or Supplemental Order as to Costs.

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(Decided and Filed July 19, 1956)

(235 F 2d 129)

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Before Simons, Allen and Miller, Circuit Judges.

Per Curiam. On the appeal in this case we reversed the judgment of the District Court in favor of plaintiffs-appellees in the amount of $306,982.62. *Knapp* v. *Kinsey*, 232 F. (2d) 458. In the opinion and order of reversal no reference was made to costs.

Rule 23(3), Rules of this Court provides: "In cases of reversal of any judgment or decree in this court, costs shall be allowed to the appellant, unless otherwise ordered by the court." Appellees have filed a "Petiton for Rehearing or Supplemental Order as to Costs," asking that costs to appellants on the appeal be disallowed or, in any event be equitably apportioned between appellants and appellees. The main items involved are for appellants, $9,356.70 for printing appellants' appendix and $1,875 for premium on supersedeas bond, and for appellees, $7,745.50 for printing appellees' appendix and cross reference table.

The authority to disallow costs in full to a successful party on appeal is usually exercised in cases involving (1) violation of the rules in preparing the record on appeal,

*The Chickie,* 141 F. (2d) 80, 86, C. A. 3rd; *Chalmette Petroleum Corp* v. *Chalmette Oil Dist. Co.,* 143 F. (2d) 826, 829, C. A. 5th; (2) preparing an unreasonably large record or including therein unnecessary matter, *Acadian Production Corp.* v. *Land,* 136 F. (2d) 1, 3, C. A. 5th; *Consolidated Theatres* v. *Warner Bros. Cir. Man. Corp.,* 216 F. (2d) 920, 928, C. A. 2nd; *Phillips Petroleum Co.* v. *Williams,* 159 F. (2d) 1011, C. A. 5th; (3) where the reversal is actually a modification of the judgment rather than a complete reversal, *Shima* v. *Brown,* 133 F. (2d) 48, 49-50, *C. A. D. C.; Smith* v. *Onyx Oil and Chemical Co.,* 218 F. (2d) 104, 112, C. A. 3rd; *Messenger Corporation* v. *Smith,* 136 F. (2d) 172, C. A. 7th; *Bosworth* v. *St. Louis Terminal R. Assn.,* 174 U. S. 182, 190; (4) where the appeal was unnecessary if proper steps had been taken in the lower court, *City of Gold Hill Or.* v. *California Oregon Power Co.,* 35 F. (2d) 317, 319, C. A. 9th; *Kansas City Life Ins. Co.* v. *Wells,* 133 F. (2d) 224, 228, C. A. 8th; *Blacklock* v. *Small,* 127 U. S. 96, 105, and (5) where discretion is exercised in accordance with what appear to be the equities in the particular case, *Rector* v. *Massachusetts Bonding & Ins. Co.,* 191 F. (2d) 329, 333, C. A. D. C.; *Crowe* v. *Di Manno,* 225 F. (2d) 652, 659, C. A. 1st.

Appellees apparently recognize these general controlling principles and that in many cases disallowance of costs is based upon fault on the part of the prevailing party. They contend that the great bulk of the expense could have been avoided by a timely claim of disqualification in the District Court which would have avoided a lengthy trial on the merits. In our opinion, Section 144, Title 28, U. S. Code was not applicable to this case in which the claimed bias or prejudice was first disclosed during the trial. Under the circumstances the remedy can not be by a change of judges during the trial; it necessarily becomes a matter of alleged prejudicial error and for correction by the Court of Appeals. *Moskun* v. *United States,* 143 F. (2d) 129, C. A. 6th; *United States* v. *Flegenheimer,* 14 F. Supp. 584, 591, D. C. N. J. We do not agree with appellees' contention that the issue was not timely raised and preserved by appellants during the trial in the District Court.

Nor do we find any fault on the part of appellants in preparing and presenting an appendix of approximately 4400 pages which presented the issues on the merits as well as the issue of the judgment being invalid because of alleged bias and prejudice. Although the case was not decided on its merits and the major portion of the appendix was not needed by the Court, it would have been needed if it had become necessary to consider the case on the merits. It is to be noted that appellees filed their own separate appendix of approximately 2700 pages which likewise presented the issues on the merits.

Nor do we find in the case any of the other grounds which usually exist when costs are not allowed in full. The appellees defended the judgment with the utmost vigor. The record does not indicate any willingness on their part to forego any of the advantages flowing from the entry of the judgment. They acquiesced in a denial by the District Judge of a stay of execution pending appeal and the appellants were forced to execute a $250,000.00 supersedeas bond in order to challenge the judgment in this Court. The appellants obtained a complete reversal of the judgment. The costs are heavy, but they were necessary to fully protect appellants from the judgment appealed from. If the appellants had not prevailed on this appeal these same costs would have been assessed against them in addition to the amount of the judgment. We do not find in this case sufficient reason for departing from the usual rule of awarding costs in full to the prevailing party.

Appellees' Petition for Rehearing or Supplemental Order as to Costs is denied.

# UNITED STATES DISTRICT COURT
## Eastern District of Michigan
## Southern Division

JOHN P. KINSEY, individually, and as a Director and Stockholder of MONROE PAPER PRODUCTS COMPANY, a Michigan Corporation; LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER COMPANY, a Connecticut Corporation, individually and as Stockholders of said MONROE PAPER PRODUCTS COMPANY,

*Plaintiffs,*

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as Directors and Stockholders of said MONROE PAPER PRODUCTS COMPANY, and as Trustees under Voting Trust Agreement dated as of December 31, 1953, pertaining to stock therein; GEORGE J. HUBER, individually and as Chairman of Stockholders' Committee of MONROE PAPER PRODUCTS COMPANY stock, and said MONROE PAPER PRODUCTS COMPANY,

*Defendants.*

13179

OPINION OF THE COURT*

(Decided and Filed July 30, 1957, Honorable Frank A. Picard)

(Published, as corrected, 154 F Supp. 263)

Plaintiffs move this court, pursuant to Rule 54(b) FRCP, to invalidate a voting trust agreement while re-

*As corrected by order of August 1, 1957.

serving judgment on damages and other related issues of fact raised by their complaint.

## FINDINGS OF FACT

All plaintiffs are stockholders of Monroe Paper Products Company, and plaintiff Kinsey is, in addition, a director. Defendants, Knapp, Blum, Raney, Leathers and Sempliner are directors and also trustees under the above voting trust agreement. Defendant Huber, neither a trustee nor director, was chairman of the stockholders' committee which allegedly participated in creating the trust agreement.

The controversial trust, which empowered defendant trustees to vote 95,244 shares of Monroe's stock was created at a time when plaintiffs and defendants were waging a fight to gain financial and managerial control of the corporation. The fight followed the death of Alex J. Groesbesk, its president, on May 10, 1953, owning 32,814½ of the 190,000 shares of Monroe stock and who had been for years the dominant figure in the company's operation, control and management. Ex-Governor Groesbeck died in 1953 and in September, 1953 National Container Corporation made a public offer to purchase all, but not less than 55.6% of Monroe's outstanding stock thus precipitating the battle for control, which first stage began in September, 1953 with the establishment of an escrow agreement by defendants and was augmented in December, 1953, when the voting trust agreement was consummated.

Defendants' escrow agreement, which was put into effect immediately after National Container's purchase offer, but shortly before the 1953 stockholders' meeting, was designated to defeat acceptance of that offer. That escrow agreement provided that any person wishing to purchase company stock for $10.00 per share could deposit money in a fund to be held by the Monroe State Bank for that purpose. Plaintiffs allege that defendants, by soliciting company customers, suppliers, employees, and by contributions of $15,000.00 by Raney, $15,000.00 by Leathers and

$5,000.00 by Blum, respectively, were able to secure deposit of $162,000.00 in escrow with which was purchased 15,538 shares of company stock both through means criticized by plaintiffs as fraudulent and with these secured proxies as well as other stock controlled by them, along with their individual holdings, enabled them to defeat the National Container offer and secure their own reelection as directors.

But the threat that plaintiffs might still be able to purchase controlling interest in Monroe shortly, remained, so to neutralize this possibility the voting trust agreement was executed on December 31, 1953, as a permanent proxy to defendants for a period of five years. Plaintiffs claim that the voting trust, thus created again by alleged devious means, is void or at least voidable as a matter of law and they have enumerated the following five reasons why that voting trust is void and one reason why it is voidable.

VOID—because it

(1) Violates the Michigan Restraint of Trade Law M.S.A. 28.31 (5) and 28.36;

(2) Violates the Sherman Antitrust Act 15 U.S.C. 1;

(3) Violates Michigan Common Law against restraints on the alienation of property;

(4) Places each director in an inconsistent position as director and trustee in violation of his fiduciary duties as the former; and

(5) Defendants, in creating the trust violated 15 U.S.C. 78cc and Rule X 10B-5 of the Securities Exchange Commission.

VOIDABLE—because

(1) Neither the agreement, nor certificates issued pursuant thereto, were registered as required by the Securities Act of 1933, 15 U.S.C. 77a et seq., and Michigan Blue Sky Law M.S.A. 19.747.

## CONCLUSIONS OR LAW

We briefly discuss and decide these contentions seriatim.

1. Is trust agreement void because in violation of Michigan's laws against Restraint of Trade?

Sub-paragraph (5) of M.S.A. 28.31 provides inter alia, that it shall be unlawful for two or more persons to agree not to sell any article or commodity below a common fixed price, or in any manner establish or settle the price of any article so as to directly or indirectly pr[illegible]e free and unrestricted competition for the purchase [illegible]. of. M.S.A. 28.36 declares that any contract violation of sub-paragraph (5) is against public policy and absolutely void.

True under the trust agreement the stockholders agreed that the stock deposited thereunder could not be sold for (a) less than $15.00 per share and (b) only if the purchaser would purchase all of the stock so deposited. But we do not agree with plaintiffs' claim that all price fixing is illegal under Michigan law; on the contrary only contracts embodying unreasonable price fixing provisions. *S-K Oil Co. v Mac's Auto Mart, Inc.*, 329 Mich. 351. In *Hubbard v. Miller*, 27 Mich. 14 at p. 19, Chief Justice Christiancy narrowed the prohibition to the reasonableness of any contract encompassing price fixing. He said:

> "* * * if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public, the restraint will be held valid."

We hold that at this point this trust agreement is not unreasonable from any angle, "business situation," "objects of the parties" designed "for the protection of the legitimate interests of the parties" or "not specially injurious to the public" as a matter of law.

2. Does the trust agreement violate the Sherman trust law?

Here again plaintiffs base invalidity upon alleged price fixing and restraint of trade features of the agreement. Section 1 of the Sherman Antitrust Act condemns as illegal

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations."

While the Sherman Act, like the Michigan Restraint of Trade Act, does not encompass and condemn all activity that may restrain trade (*Apex Hosiery Co. v Leader*, 310 U. S. 469) unlike the Michigan Act, price fixing under the Sherman Act is illegal per se (*U. S. v McKesson and Robbins*, 351 U. S. 305) if it affects commerce among the States, and is not exempt by the law,[1] the good intentions of the parties to the agreement, and the reasonableness thereof to the contrary notwithstanding.

Here we are not concerned with reasonableness, dependent upon circumstances and facts surrounding the execution of the trust agreement, but only with whether the agreement fixes prices so that it restrains commerce among the states.

And again we find that plaintiffs' contention that the trust agreement in question fixed prices is not well founded. As stated in *U. S. v Bausch and Lomb Co.*, 321 U.S. 707 p. 722, quoting *U. S. v Colgate & Co.*, 250 U.S. 300,

> "* * * the Sherman Act 'does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell'."

It may be appreciated, therefore, that limitation upon exercise of this right is that the seller may not, under the Sherman Act, go beyond exercise of the right, and unduly

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[1] Miller-Tydings Act 50 Stat. 693 and the McGuire Act 66 Stat. 632.

hinder, by contract or other means, the free natural flow of interstate commerce. In the case at bar the stockholders under the trust agreement simply authorized the trustees not to sell to any person who would not buy all of their stock at $15.00 per share. They went no further. Such authority of trustees to sell only upon certain conditions, or indeed, to refuse to sell at all, is a feature indispensable to the existence of such agreements. Voting trusts are authorized in nearly all, if not all, of the forty-eight states. We do not divine the congressional intent, at the time the Sherman Act was enacted, to have been to outlaw such agreements by implication and we will not make that result possible by abuse of the power of judicial construction.

Aside from the foregoing, we entertain grave doubts as to whether the trustees and the stockholders under the trust agreement limited activity that may be characterized as "commerce among the several states." The trust was consummated in Michigan, and it is clear that, for the most part, economic repercussions therefrom will not reach beyond the borders of this state. See *Lawson v Woodmere,* 217 F. 2d 151; *Spears Free Clinic and Hospital v Cleere,* 197 F. 2d 125.

We deny the motion insofar as it is based upon the instant contention.

(3) Does the trust agreement violate the common law of Michigan against restraints on the alienation of property?

Plaintiffs cite several Michigan cases to sustain this contention. In other words, if an instrument limits the persons to whom property can be sold, either by specific designation, or by setting a price exceedingly high or exceedingly low, such instrument has the effect of removing the property from the market and is void as a restraint on the right of alienation. This court is of the opinion that the Michigan cases do not support plaintiffs' position. Indeed, the most recent case on the subject, *Lantis v Cook,* 342 Mich. 347, cited by plaintiffs to sustain their contentions, holds to the contrary. In that case Michigan's Supreme Court held valid a deed which provided that if the grantees

decided to sell the property conveyed in lieu of using it as a homestead, they must first offer it to the grantor for $4,000.00. In that case the deed fixed a price and in addition thereto, determined who could purchase. Yet the court held it was not an illegal restraint on alienation. In the case at bar the stockholders by use of a voting trust merely did what they had a right to do, i.e. divorced their legal and equitable interest in the stock by conveying the former to the trustees while retaining the latter for themselves. This case is, we believe, dead against plaintiffs in the majority opinion. See also *Ecclestone v Indialantic, Inc.*, 319 Mich. 248. Any restraint or alienation resulting therefrom was merely incidental—was not the main purpose of the agreement, and did not adversely affect its validity. *Lantis v Cook*, supra.

(4) Did the voting trust agreement place defendant directors in an inconsistent position in violation of their fiduciary duties?

Plaintiffs' assertion that the trust agreement placed defendants in a position antagonistic to their fiduciary duties as directors is based upon the following:

(a) A 1952 stockholders' resolution required defendants as directors to purchase stock on behalf of the corporation, while their duties as trustees required them to make such purchase impossible, since under the trust no stock could be purchased by the corporation or any other person unless 95,000 shares were purchased, and

(b) Under the trust agreement and the escrow agreement which preceded it, defendants were permitted to, and did purchase stock for their own benefit while the 1952 stockholders' resolution required them as directors to make such purchases on behalf of the corporation.

While plaintiffs claim that a 1952 stockholders' resolution requires defendant trustee directors to purchase stock for the corporation, this is denied by the latter. They contend that the stock purchase resolution was no longer in effect when they purchased stock for themselves, nor was

it in effect at the time the trust agreement was executed, and their assumption of their duties of trustees. These issues should be decided only after proofs have been taken and not on motion for summary judgment.

*Seagrave Corp. v Mount*, 212 F. 2d 389 and *Ashman v Miller*, 101 F. 2d 85 cited by plaintiffs, were decided only after it had been proven that the loyalty of a director actually was divided between self interest and duty to the corporation and its stockholders and so a conflict existed. Here again this calls for proof.

(5) Did defendants, in creating the trust agreement violate Section 78 cc of the Securities Act of 1938 and Commission Rule X-10 B-5, both of which declare that use of any "Artifice or device to defraud" or the "making of any untrue statement" renders such contract void.

This reason is based on the letter allegedly sent by defendants to certain stockholders, in order to induce them to subject their stock to the trust and which allegedly contained a false and untrue statement. The charge is immaterial since the facts are denied by defendants and until such time as the court is able to hear testimony we withhold judgment thereon denying plaintiffs' motion for summary judgment on this ground.

We come now to plaintiffs' claim that the trust agreement is

VOIDABLE

1. Because of failure to register the same under the Securities Act of 1933 and/or the Michigan Blue Sky Law.

The Securities Act of 1933 does prohibit use of interstate commerce mediums of communications (mail, transportation, etc.) to facilitate the sale of any security not registered with the Securities Exchange Commission and provides Civil and Criminal penalties for the violation thereof. See Section 77L and 77. But its applicability is premised upon certain conditions—

1. A public offer by an insurer to sell or buy;
2. The security so offered must not be registered,

nor exempt, and must be of a type covered by the Act; and

3. There must have been use of the instrumentalities of interstate commerce to buy, sell, exchange or offer to do any of the foregoing.

Here we hold that the voting trust, the certificates and defendants' actions fall within the prohibitions of the Act for the following reasons:

1. "Security" includes voting trust certificates. Sec. 77B (1);

2. "Sale," "sell," "offer to sell" includes any attempt or offer to dispose of the securities. Sec. 77B(3). Sale also includes exchanges of securities. See *U. S. v Riedel*, 126 F. 2d 81;

3. "Issuer" of the security includes and means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provision of the trust or other agreement; and

4. An offer is public even though the offer is confined to stockholders of offering company. See *Merger Mines Corp. v Grismer*, 137 F. 2d 335; *Securities and Exchange Commission v Sunbeam Gold Mines Co., et al*, 95 F. 2d 699.

Defendants admittedly failed to register the Voting Trust or the certificates with either the proper state or federal administrative agency and a letter soliciting stockholders to subject their stock to the Voting Trust was sent through the channels of interstate commerce. In view of the cases and sections above cited, there can be no doubt that defendants violated the Security Act. This is true because clearly defendants as issuers of the voting trust certificates made a public offering of a security covered by the Security Act. See *Corporation Trust Co. v Logan*, 52 F. Supp. 999.

The trust agreement is voidable but the next question that presents itself for decision is what remedy, if any, is available to plaintiffs.

We believe *Corporation Trust Co. v Logan*, supra, answers this problem. There a group of stockholders subjected their stock to a Voting Trust Agreement. The trustees issued voting certificates, but failed to file a regis-

tration statement. Subsequently, the stockholders tendered their voting certificates and asked for return of their stock certificates on grounds that the voting trust was illegal and void because there had been no compliance with the Securities Act of 1933. The court held in a well reasoned opinion that the stockholders were entitled to return of their stock. The ruling was made in face of the voting trustees' contention that if the stockholders were entitled to any relief at all it was by way of damages or in the alternative by injunction until provisions of the Act relating to registration were complied with. The court rejected this argument citing *Deckert v Independence Corp.*, 311 U. S. 282 and Section 77L (1) of the Act. Quoting from the Deckert case, supra, the court said at p. 1004:

> "Moreover, in Section 22(a), 15 USCA Section 77v (a), specified courts are given jurisdiction 'of all suits in equity and actions at law brought to enforce any liability or duty created by this sub-chapter.' The power to enforce implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case * * *"

Then the court added:

> " It is clear that the case at bar comes within the first classification of Section 12 which relates to unlawful sales of securities for which no registration statement has been filed. Under that section, the remedy afforded is the right to sue, either in law or in equity, 'to recover the consideration paid for such security * * *.' As the Voting Trust Certificate is, under the statute, the security, the consideration paid in exchange therefor can only be the Mokan stock, certificates surrendered by the stockholders) and it is this stock which defendants (plaintiffs in the case before us) seek to have restored to them upon the tender of the trust certificates. I conclude the statute authorizes the relief prayed for here." (Parenthesis ours)

And finally at page 1005:

> "* * * if the agreement was tainted originally with illegality then any party who desires should, I believe, be free from the bondage of such an instrument."

True, in the Logan case the stockholders who sought release of their stock from the voting trust were original parties to the agreement, while in the case at bar, plaintiff Waterbury is an assignee who had knowledge of the agreement's imperfection prior to its acquisition of the voting trust certificates, which fact tends to lend truth to defendants' contention that the voting certificates were purchased for the express purpose of bringing suit. But this is of no consequence. As held in *Traer v Clews,* 115 U.S. 528, p. 539, there is a distinction between the conveyance of a mere right to file a bill in equity and the conveyance of the property to which the former is attached. The former is "contrary to public policy and savoring of maintenance," but when the property itself is conveyed

> "the fact that the grantee may be compelled to bring a suit to enforce his right to the property, does not render the conveyance void.",

or defeat the right to maintain suit.

In view of our holding that plaintiff Waterbury is entitled to renounce the voting trust because in violation of the Securities Act of 1933, we deem it unnecessary to unduly lengthen this memorandum with a detailed discussion of the parties' rights under Michigan's Blue Sky Law. Suffice to say that M.S.A. 19.747 prohibits sale of securities unless the same have been registered. Section 19.760 provides than in cases where securities are sold in violation of the Blue Sky Law, the transaction is voidable at the election of the purchaser. Under the Michigan law, as under the federal, the fact that the person seeking to void the transaction is an assignee makes no difference. Rights under the Blue Sky Law are assignable. See *Superior Piston Ring Co. v Brown, Anthony & Co. Inc.*, 294 Mich. 358.

This is a court of equity. For failing to comply with the law should defendants be rewarded for their wrong doing or condemned with nothing but a verbal chastising? We don't believe so.

We hold—

1. That the "trust agreement" was voidable and that plaintiffs are in a position to challenge it. Therefore with the date for the annual election coming in September we believe that this corporation and its stockholders should be put in status quo ante as far as possible. As a result of a resolution passed before dissention was apparent, the corporation did purchase certain stock from stockholders marked for retirement. Whatever that stock amounted to—we hold it should be placed in the treasury and not voted at the annual election;

2. Trust certificates purchased by Waterbury may be exchanged at the office of the corporation or with the depository, wherever they may be, for stock certificates in his name;

3. The original owners of all the stock sold since the trust agreement was entered into are hereby entitled to a return of the same upon payment of the consideration received by them when they sold their stock certificates and this must be done not later than September 1;

4. All holders of stock certificates who so desire may exchange their trust certificates for their own stock certificates on or before September 1, by written request, and if they fail to do so by that time then their failure will be taken as a granting of proxy authority by the trustees to vote the stock; and

5. A copy of the last four pages of this opinion to be sent to all stockholders of record as of December 1, 1953, on or before August 9, 1957.

In other words, we believe that a free election as near as we can have it, for the directors and controlling officers of this corporation should be held at the annual meeting, notice of which shall be given according to the by-laws by the proper officers so that perhaps this corporation may find an end to its troubles.

The above constitutes a partial judgment in this case at the present time chiefly as provided in Rule 54(b). We intend it to be appealable and determine there is no just cause for delay in having these issues finally settled.

We do not in this opinion decide anything on the facts. We do not hold that it is not possible that the proof might alter our decision as to whether or not this trust agreement is void or voidable on the facts. We do not pass upon any of the alleged wrongful acts of these directors.

Finally, we believe that the following questions of fact should be taken up later in the order selected by plaintiffs since plaintiffs have brought action:

(a) The alleged activities of these defendant directors and suppliers who purchased stock and the alleged "reward" to these suppliers in surplus inventory to the damage of the corporation;

(b) The alleged fraud of the Huber letter and his other alleged participation;

(c) The alleged fraud of the insurance appraisel;

(d) The alleged fraud of the representation of the amount of trust certificates then sold as sent to some of the stockholders in a certain list; and

(e) The alleged fraud of pensions granted to officers of the corporation through the efforts of these defendants or some of them.

There is nothing in this decision that prevents any stockholder or anyone else from now purchasing the stock of the Monroe Paper Products Company wherever he may find it or for whatever price. This partial judgment is aimed to free the stock of this corporation as much as we can in view of the circumstances under which we find the corporation at the present time and to temporarily, at least, dispose of the alleged double and triple damage claims of plaintiffs based on the trust agreement by being void as a matter of law.

FRANK A. PICARD,
United States District Judge

Dated: July 30, 1957

# Nos. 13355-13356
# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

Burton S. Knapp, et al.,
*Appellants,*
No. 13355
v.
John P. Kinsey, et al.,
*Appellees.*

John P. Kinsey, et al.,
*Appellants,*
No. 13356
v.
Burton S. Knapp, et al.,
*Appellees.*

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

(Decided and Filed December 6, 1957)
(249 F 2d 797)

Before Simons, Chief Judge, Allen and Miller, Circuit Judges.

Miller, Circuit Judge. This is a Stockholders' suit brought by John P. Kinsey and others against Burton S. Knapp and others, individually, and as directors and stockholders of the Monroe Paper Products Company, hereinafter referred to as the Company, charging breach of fiduciary duties on the part of the directors, seeking their removal as directors of the Company, and demanding an accounting for the loss alleged to have been sustained by the Company by reason of said violations of fiduciary duties.* The case has been before us previously on certain phases of the

* The parties will be referred to herein as plaintiffs and defendants in the District Court.

litigation. Reference is made to the opinions in those cases for the purpose of showing the history of the litigation and the facts more in detail than will be stated here. Appeal of *U. S. Securities and Exchange Commission, and William H. Timbers, Its General Counsel*, 226 F. (2d) 501, C. A. 6th; *Knapp* v. *Kinsey*, 232 F. (2d) 458, C. A. 6th; *Knapp* v. *Kinsey*, 235 F. (2d) 129, C. A. 6th, cert. denied, 352 U. S. 892.

Following the death on March 10, 1953, of Alex J. Groesbeck, President of the Company, a director, and the largest single shareholder of the Company, differences arose between some of the stockholders and directors eventually resulting in the present fight for the control of the Company. A Stockholders' Committee was formed by the defendants, which drafted a Voting Trust Agreement, hereinafter referred to as the Trust, which gave to the defendant directors, who were the five Trustees under the Trust, the voting control of the majority of the Company's stock for five years. The present appeal involves the validity of this Trust.

The Trust was dated December 31, 1953. It states as the reasons for its existence that the business interests of the Company required stability and continuity in management in order to properly develop the property and earning capacity of the Company and that the subscribing stockholders believed it to be essential to their interests to protect themselves against the purchase of a majority of the Company shares by parties acting on behalf of other interests. Subscribing stockholders agreed to endorse and deposit their stock certificates forthwith and to receive in exchange therefor Voting Trust Certificates, hereinafter referred to as Certificates, thereby investing said Trustees with the legal title to such stock with the exclusive right to vote such shares of stock at every meeting of the stockholders of the Company during the life of the Trust.

The Trust provided that until and including December 30, 1958, the stockholders would not sell their respective company shares although they were at liberty to deal with their Certificates, and that during that period the Trustees would have the exclusive power to sell said shares of stock, provided that no sale could be made by the Trustees save

of all the deposited shares in lump and that no sale should be made at a less price than at the rate of $15 for each share so deposited. The Trustees had the sole discretion to determine the advisability or the desirability of such a sale. Upon the expiration of the term of the Trust without a sale of the stock by the Trustees, the stock was to be returned to the holders of the Certificates upon surrender of said Certificates. There was evidence that the market value of the stock at the time was approximately $10.00 or $10.50 a share. The present action was filed on February 2, 1954, by the plaintiffs, individually, and as stockholders of the Company, seeking, together with other relief hereinabove referred to, to invalidate the Trust. The plaintiffs were stockholders, but not Certificate owners. While the suit was pending, one of the plaintiffs, The Waterbury Corrugated Container Co., hereinafter referred to as the Waterbury Company, purchased through agents Certificates from depositing stockholders representing 11,797½ shares, paying in some instances as high as $17.00 and $19.00 per share. If these shares of stock were withdrawn from the Trust, the Trust would have been left with less than 50 per cent of the total outstanding stock, and if they were added to the plaintiffs' prior holdings, their total holdings in the Company would exceed 50 per cent.

The Waterbury Company tendered these Certificates to the Trustees and demanded the return of the stock which they represented, claiming that it had acquired through the purchase of the Certificates the right to rescind the Trust because the Certificates were not registered with the Securities and Exchange Commission, and were sold in violation of the Securities Act of 1933, hereinafter referred to as the Act. Section 5(a)(1)(2) of the Act, Section 77e (a)(1)(2), Title 15, U. S. Code. A similar claim was made with respect to the so-called Michigan Blue Sky Law, Sections 19.741-19.784, M. S. A. Plaintiffs were permitted to file on May 3, 1955, their supplemental complaint bringing this issue into the case.

The defendant Trustees filed an answer to the amended complaint, which denied many of the allegations therein, affirmatively stated some of the factual background of the

controversy, which they claimed fully justified the formation of the Trust, and contained several affirmative defenses.

A separate answer and counterclaim was filed by the defendants individually and as directors and officers of the Company, which also denied many of the allegations of the amended complaint and affirmatively alleged facts which they claimed gave a more complete picture of the controversy and fully justified their actions. This answer charged that the primary purpose of the plaintiffs in instituting the action was to gain control of the Company and not to correct the alleged wrongs recited in the complaint; that their action was in itself a combination in restraint of trade in violation of the Sherman Anti-Trust Law and the Clayton Act and the Michigan statutes; and that the plaintiffs did not come before the Court with clean hands.

The counterclaim charged that about 1950 a group of individuals, including the plaintiffs, entered into a conspiracy to acquire control of the Company for their own interests to the detriment of the general stockholders, and that throughout the years between 1950 and 1953 this group of conspirators used the assets of the Company for their own purposes and to acquire additional stock for the purpose of eventually gaining control. It charged that the purpose of acquiring control was to make the balance of the stock of small import by reason of which they would be able to purchase it at a depressed price, which was a fraud upon the stockholders.

The counterclaim also charged that a further purpose in gaining control was to loot the treasury of the Company, which in September 1953 contained a million dollars in cash, and with such cash repay the loan they had made from the Chase National Bank, the proceeds of which were used to purchase large blocks of stock in the Company.

The counterclaim asked that the Court remove Kinsey as a director of the Company, that it enjoin the plaintiffs from acquiring or purchasing further shares of stock of the Company, and that it require them to forthwith dispose of their interest and stock in the Company in blocks not to exceed 5,000 shares each, and to such persons as would have the approval of the Court.

On June 11, 1957, the plaintiffs moved for a partial summary judgment enjoining the defendant Trustees under the Trust from carrying out said Trust, from voting any of the deposited stock and requiring them to cancel all deposits of stock made under the Trust, recall all Certificates issued thereunder and return all deposited stock to the depositing stockholders. Several different grounds were stated in support of the motion which were separately discussed and ruled upon by the District Judge in his opinion hereinafter referred to. But in view of the District Judge's ruling, we will confine our discussion to the alleged violation of the Securities Act.

The defendants filed the affidavit of two of the five Trustees, which stated that there was no issue of fact as to the text of the Trust or that the Certificates were not registered under the Act nor validated by the Michigan Corporation and Securities Commission, but that other assertions of fact in plaintiffs' motion were denied. With respect to the alleged violations of the Act, the affidavit stated that the invitation to join in the Trust was never extended to the general public; that it was addressed to only a limited group of people (approximately 300 named individuals) who were already stockholders of the Company; that most of them were residents of Monroe, Michigan, or its vicinity who were extensively informed regarding the Company's affairs; that more than 80 per cent of all the Company's stockholders, owning approximately 52 per cent of the Company's outstanding stock, had affiliated themselves with the Trust; and that the Trustees were advised by counsel that under the circumstances present the Trust invitees were "a limited class of informed persons able to fend for themselves" within the ruling of *S. E. C.* v. *Ralston Purina Co.*, 346 U. S. 119, 125, so that the transaction was not a public offering. The affidavit also stated that the plaintiffs were not original holders of Certificates or Certificate holders at the time when this action was commenced, but while this suit was pending they bought some of the Certificates with full knowledge of the fact that said Certificates had not been registered under the Securities Act. It also stated that no action to set aside the Trust had

been brought by any member thereof within one year after the issuance of his Certificate , nor had any action allowed by the Securities Act ever been brought by any person at any time.

Following a hearing on June 26, 1957, the District Judge handed down an opinion on July 30, 1957. *Kinsey* v. *Knapp*, 154 F. Supp. 263. In it he reviewed plaintiffs' contention that the Trust was void, because it (1) violated the Michigan Restraints of Trade Law, (2) violated the Sherman Anti-Trust Act, (3) violated the Michigan Common Law against Restraints on Alienation of Property, (4) placed each director in an inconsistent position as director and trustee in violation of his fiduciary duties as the former, and (5) because the defendants, in creating the Trust, violated Section 78cc, Title 15, U. S. Code, and Rule X-10B-5 of the Securities Exchange Commission, which declare that the use of any artifice or device to defraud or the making of any untrue statement renders the contract void. Each of these contentions was rejected. With reference to grounds 4 and 5, the District Judge was of the opinion that factual issues were in dispute which prevented disposition of them on a motion for summary judgment.

However, the District Judge also ruled that the Trust was voidable because of the failure to register the Certificates under the Securities Act of 1933 and the Michigan Blue Sky Law, and that the plaintiffs, although they were assignees of the certificates, were in a position to challenge it. A partial final judgment, intended to be appealable in accordance with the provisions of Rule 54(b), Rules of Civil Procedure, was entered on August 1, 1957, which held the trust to be not void but voidable by the depositing stockholders and by plaintiff the Waterbury Company. The judgment directed that prior to September 1, 1957, upon written request of any depositing stockholder, or his assignee or vendee including plaintiff the Waterbury Company, and upon surrender of the Certificate, the Trustees should surrender and deliver the shares of stock deposited, and in the case of an assignee or vendee the Company should issue a new stock certificate upon surrender of the stock so returned to the assignee or vendee. The judgment

also directed that an annual meeting of the stockholders of the Company be held during September 1957 and provided that any depositing stockholder or assignee who did not surrender his certificate and request return of the deposited stock prior to September 1, 1957, would be deemed to have given proxy authority to vote such stock to the trustees. Jurisdiction was reserved of all matters not adjudicated therein.

The defendant trustees filed Notice of Appeal from this judgment on August 2, 1957. On August 6, 1957, Chief Judge Simons of this Court granted a stay of proceedings pending appeal upon the execution of a supersedeas bond in the amount of $100,000, which bond was executed and filed on August 9, 1957.

On August 6, 1957, the plaintiffs filed a cross appeal, by which they contend that the District Judge erred in holding that the Trust was not void, and that certain findings of fact made by the District Judge were clearly erroneous. The defendants have moved in this Court to dismiss the cross appeal on the ground that one who secures by a judgment the relief he seeks can not maintain an appeal to reverse or modify the judgment or to review the proceedings on which it is founded. *Mach* v. *Abbott Co.*, 136 F. (2d) 7, 10, C. A. 8th. Although the plaintiffs were successful in having their motion for summary judgment sustained, they claim that the cross appeal was necessary in order to avoid the possibility of a successful claim of res adjudicata as to such questions being made in subsequent proceedings.

On this appeal, the defendants concede that under Sections 2, 5 and 6 of the Act, the Certificates were unregistered securities sold by an issuer in interstate commerce, Section 77b, 77e, 77f, Title 15, U. S. Code, but contend that they were exempted transactions under Section 4(1) of the Act, Section 77d, Title 15, U. S. Code, which exempts "transactions by an issuer not involving any public offering." The District Judge rejected this contention. That is the issue on this appeal.

The Act does not define the scope of Section 4(1)'s private offering exemption. The Supreme Court in discussing the exemption said in *S. E. C.* v. *Ralston Purina Co.*, supra,

346 U. S. 119, 124-127, that the design of the statute was to protect investors by promoting full disclosure of information thought necessary to informed investment decisions, that the focus of inquiry should be on the need of the offerees for the protection afforded by registration, that the application of the exemption should turn on whether the particular class of persons affected needs the protection of the Act, and that an offering to those who are shown to be able to fend for themselves is a transaction not involving any public offering. It quoted with approval from the opinion in *Securities and Exchange Commission* v. *Sunbeam Gold Mines Co.*, 95 F. (2d) 699, 701, C. A. 9th, to the effect that to be public an offer need not be open to the whole world and the statement therein, "To determine the distinction between 'public' and 'private' in any particular context, it is essential to examine the circumstances under which the distinction is sought to be established and to consider the purposes sought to be achieved by such distinction."

In *Campbell* v. *Degenther*, 97 F. Supp. 975, 977, the Court, in holding a transaction not to be a public offering, said that the principal factors which determine a public offering have been construed to include: (a) the number of offerees and their relationship to each other and the issuer, (b) the number of units offered, (c) the size of the offering, and (d) the manner of the offering.

The foregoing authorities indicate that a decision of this issue involves a thorough development of the factual situation surrounding the offerees. Defendants' main contention on this appeal is that the District Judge should not have decided the issue involving the validity of the Trust upon summary judgment proceedings, but that they were entitled to fully develop this issue through the usual trial procedure.

Summary judgment is authorized under Rule 56(c), Federal Rules of Civil Procedure, "if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Plaintiffs contend that although

there may be a genuine issue of fact with respect to most of the relief sought by them, there was, however, no genuine issue of fact with respect to the validity of the Trust and that the District Judge was authorized to decide it on the undisputed facts as a matter of law.

The construction and applicability of the summary judgment rule has been before us on several previous occasions. In *Begnaud* v. *White,* 170 F. (2d) 323, 327, C. A. 6th, we said, "The authorities indicate that the trial judge should be slow in passing upon a motion for summary judgment which would deprive a party of his right to a trial by jury where there is a reasonable indication that a material fact is in dispute," citing *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620. In *Lloyd* v. *United Liquors Corp.*, 203 F. (2d) 789, 793, C. A. 6th, we quoted with approval from the opinion in *Doehler Metal Furniture Co.* v. *United States,* 149 F. (2d) 130, 135, C. A. 2nd, as follows, "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment . . . Such a judgment, wisely used, is a praise-worthy and time-saving device. But, although prompt despatch (sic.) of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than the delay." Other cases in which we held that summary judgment proceedings did not afford the losing party an adequate opportunity to develop the facts and should not have been used are *Estepp* v. *Norfolk & Western Railway Co.*, 192 F. (2d) 889, C. A. 6th, *Bellak v. United Home Life Insurance Co.*, 211 F. (2d) 280, 283, C. A. 6th and *Hoy* v. *Progress Pattern Co.*, 217 F. (2d) 701, 704, C. A. 6th.

In *Stevens* v. *Howard D. Johnson Co.*, 181 F. (2d) 390, 394, C. A. 4th, the Court said, "It must not be forgotten that, in actions at law, trial by jury of disputed questions of fact is guaranteed by the Constitution, and that even questions of law arising in a case involving questions of fact can be more satisfactorily decided when the facts are fully before the Court than is possible upon pleadings and affidavits." The opinion further stated that a motion for summary judgment 'should be granted only where it is

perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. (Cases cited.) And this is true even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. (Cases cited.)" In *Griffeth* v. *Utah Power & Light Co.*, 226 F. (2d) 661, 669, C. A. 9th, the Court said, "Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubt upon the point must be resolved against the moving party."

In *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-257, a case which seems to be applicable to the present controversy, the Supreme Court said, "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." Continuing, the Court said, "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." The District Judge in the present case apparently had the same thought when he stated in his opinion, "We do not in this opinion decide anything on the facts. We do not hold that it is not possible that the proof might alter our decision as to whether or not this trust agreement is void or voidable on the facts."

As shown by the foregoing review of the pleadings and the opinion of the District Judge, this case is not a simple case. The amended and supplemental complaint comprises 58 pages of appellants' appendix. The Voting Trustees'

answer comprises 23 pages. The answer and counterclaim of defendants as individuals and as directors and officers of the Company comprises 23 pages. The issues are numerous and complex, both factual and legal. The opinions in the prior reviews by this Court disclose the intensity of the litigation by the respective parties. It involves several hundred thousands of dollars. A former trial in which a partial final judgment was rendered and subsequently reversed on review started October 12, 1954, and continued until June 2, 1955. The transcript consisted of approximately 10,000 pages. Since that review the plaintiffs have served upon defendants 928 requests for admission of facts, of which only 317 were admitted and an additional 168 partially admitted. There are 348 deposition exhibits and an additional 520 trial exhibits, the genuineness of which, in most instances, has been admitted.

It is difficult to divorce the issue of the validity of the Trust from the rest of this litigation. It is closely tied in with the attempt of the plaintiffs to remove the defendants as directors for violation of their fiduciary duties. The defendants by their counterclaim have charged the plaintiffs with an illegal conspiracy to gain control of the Company and to loot its treasury in fraud of the rights of the stockholders. The present judgment as a practical matter would give control of the Company to the plaintiffs without giving the defendants their day in Court to prove their charges that the plaintiffs by their conduct should be barred from taking over control of the Company. In the ultimate decision of this case, even if the Trust is declared invalid, it may be advisable upon a full consideration of all the facts to give some different form of relief than what is now provided by the partial summary judgment. In fact, both parties in their appeal and cross appeal complain of the exact form of relief provided by the present judgment. The District Judge in shaping his decree stated that his Court was a court of equity. Yet the defendants have charged that the plaintiffs have not come into court with clean hands. That issue has not been tried out. In the welter of charges and counter charges that exist in this case we think it necessary that the case be heard and considered

as a unit with the opportunity given to all the parties to fully develop the complete factual situation. *Kennedy* v. *Silas Mason Co.*, supra, 334 U. S. 249, 256-257.

There are other aspects of this case which support us in so ruling.

In addition to the question of whether there was a public offering, there is another question involved, which does not appear to us to have been specifically disposed of. Is the relief granted by the District Judge available to a purchaser of the security from the original owner, the purchaser knowing at the time of the purchase that the registration provisions of the Act have not been complied with? The Supreme Court has stated that the clear legislative purpose of the Act was "protection of innocent purchasers of securities" and that the design of the statute "is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions. *Frost* v. *Coeur d'Alene Mines Corp.*, 312 U. S. 38, 43; *S. E. C.* v. *Ralston Purina Co.*, supra, 346 U. S. 119, 124. See also: *Pennsylvania Co. for Insurances, etc.* v. *Deckert*, 123 F. (2d) 979, 984, C. A. 3rd. Giving full consideration to the motives and purposes of the plaintiffs in their purchase of the Certificates and to the knowledge which they had of the Company's financial condition and affairs, about which no doubt there is considerable dispute, we are faced with the important question of determining whether the plaintiffs fall within the class of investors the statute is designed to protect. We think that this phase of the question is one that should be thoroughly developed and determined by the usual trial procedure before a final ruling is made on the present phase of the case.

There are also some legal questions which should be considered and ruled upon by the District Judge before the alleged invalidity of the Trust under the Securities Act is reviewed by this Court. Defendants contend that any cause of action accruing to the original owner of a Certificate by reason of the failure to register the Certificates was not assignable to a subsequent purchaser of the Certificate, by reason of Section 12(1) of the Act, Section 77(1), Title 15, U. S. Code. *Wogahn* v. *Stevens*, 236 Wis.

132, 294 N. W. 503, and *Joseph* v. *Farnsworth Radio & Television Co.*, 99 F. Supp. 701, affirmed, 198 F. (2d) 883, C. A. 2nd, are cited in support of this contention. However, see also: *Mills* v. *Sarjem Corp.*, 133 F. Supp. 753, 761, D. C., N. J.; *Momand* v. *Twentieth-Century Fox Film Corp.*, 37 F. Supp. 649, W. D. Okla. The section of the Act referred to is subject to the construction that the cause of action is limited to the original owner, with a right to rescission if he still owns the security and a claim for damages if he is no longer the owner. This provision of the Act has not been construed by the District Judge. Also involved as possible defenses, which do not appear to us to have been specifically disposed of by the ruling below, are the Statute of Limitations, Section 13 of the Act, Section 77m, Title 15, U. S. Code, and the contention that the alleged cause of action was not acquired by the plaintiffs until after the institution of the suit. *American Bonding & Trust Co.* v. *Gibson County*, 145 F. 871, 874, C. A. 6th. These defenses may or may not involve any factual issues. If not, they could be disposed of in a summary judgment proceeding, but the absence of any specific disposition of them strengthens our conclusion that this case is not ready for the entry of a final judgment even on this limited phase of the controversy.

We are of the view that plaintiffs' motion for partial summary judgment should have been overruled. In view of our disposition of the case, appellants' motion to dismiss appellees' cross appeal is overruled. The judgment of the District Court is vacated and the case remanded for further proceedings in the District Court in conformity with the views expressed herein, without prejudice to any of the parties hereto by reason of any of the rulings contained therein.

## STATUTES AND RULES INVOLVED

*As to the Refusal of the Court of Appeals to Pass Upon the Validity of the Voting Trust*

### Federal Rules of Civil Procedure

Rule 1. *Scope of Rules.*

"* * * They shall be construed to secure the just, speedy and inexpensive determination of every action."

Rule 52(a)

"* * * Findings of fact shall not be set aside unless clearly erroneous * * *."

Rule 54(b)

"(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. * * *"

Rule 56(a), (c), (e). *Summary Judgment.*

"(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. * * *"

"(c) * * * The judgment sought shall be rendered forthwith if the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

"(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in any affidavits shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

*As to the Validity of the Voting Trust*

**The Securities Act of 1933**[1]

15 USC § 77b. *Definitions.*

"When used in this subchapter, unless the context otherwise requires—

(1) The term 'security' means any * * * voting trust certificate* * *

(2) The term 'person' means an individual * * * [or] a trust * * *. As used in this paragraph the term 'trust' shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term 'sale', 'sell', 'offer to sell' or 'offer for sale' shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an insurer and any underwriter. * * *

(4) The term 'issuer' means every person who issues or proposes to issue any security; except that with respect to * * * voting trust certificates * * * the term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other

[1] As in effect during 1953 and until June, 1954

agreement or instrument under which such securities are issued; * * *

(7) The term 'interstate commerce' means trade or commerce in securities or any transportation or communication relating thereto among the several states * * *

(8) The term 'registration statement' means the statement provided for in section 77g of this title * * *

(10) The term 'prospectus' means any prospectus, notice, circular, advertisement, letter or communication, written or by radio, which offers any security for sale; except that [exceptions not relevant]"

15 USC § 77d. *Exempted transactions.*

"The provisions of section 77e of this title shall not apply to any of the following transactions:

(1) * * * Transactions by an issuer not involving any public offering; * * *"

15 USC § 77e. *Prohibitions relating to interstate commerce and the mails.*

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

"(b) It shall be unlawful for any person, directly or indirectly—

* * *

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 77j of this title."

15 USC § 77f. *Registration of securities and signing of registration statement.*

"(a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement * * *."

15 USC § 77g. *Information required in registration statement.*

"* * * Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest for the protection of investors."

15 USC § 77j. *Information required in prospectus.*

"(a) A prospectus—

"(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (28)-(32) of Schedule A of section 77aa of this title."

* * *

"(b) Notwithstanding the provisions of subsection (a) of this section—

* * *

(2) there may be omitted from any prospectus any of the statements required under subsection (a) of this section which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or approriate in the public interest or for the protection of investors."

15 USC § 77p. *Additional remedies.*

"The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

15 USC § 77q. *Fraudulent interstate transactions.*

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

* * *

"(c) The exemptions provided in section 77c of this title shall not apply to the provisions of this section."

15 USC § 77x. *Penalties.*

"Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000, or imprisoned not more than five years, or both."

## Securities Exchange Act of 1934

15 USC § 78j. *Manipulative and deceptive devices.*

"It shall be unlawful for any person, directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 USC § 78cc. *Validity of contracts.*

* * *

"(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation; * * *"

Rule X-10B-5. *Employment of Manipulative and Deceptive Devices.*

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange.

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

## The Michigan Blue Sky Law[2]

§ 451.102 Compiled Laws Michigan 1948, Volume 3, page 9205, as amended by Act No. 115, Public Acts Michigan 1953, page 113; § 19.742 Michigan Statutes Annotated, Volume 14, 1957 Cumulative Supplement, page 127.

*Definitions; dissemination of information.*

"Sec. 2. That when used in this act:

(a) The term 'commission' means Michigan Corporation and Securities Commission.

(b) The term 'person' shall include a natural person, corporation, partnership, association, company, syndicate and trust, incorporated or unincorporated. As used herein, the term 'trust' shall be deemed to include a common law trust, * * *

(c) The term 'security' or 'securities' shall include any * * * transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, * * * any transferable share, investment contract, or beneficial interest in or title to property or profits, or any other instrument commonly known as security, * * *

(d) The term 'sale' or 'sell' shall include an agreement to transfer an interest in securities, and an exchange. * * * 'Sale' or 'sell' shall also include an attempt to sell, an option of a sale, a solicitation of a sale, a subscription or an offer to sell, or a solicitation of an offer to buy, directly or by an agent, or by a circular, letter, advertisement or otherwise: * * *

(e) The term 'issuer' shall include every person who proposes to issue or who has issued or shall hereafter issue any security."

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[2] As in effect during December, 1953 and until June, 1954.

§ 451.103 Compiled Laws Michigan 1948, Volume 3, page 9206; § 19.743 Michigan Statutes Annotated, Volume 14, page 632. *Unlawful sales; construction of Act.*

"Sec. 3. No person, either acting personally or through an agent, or as the agent of another, shall on and after the date this act goes into effect, sell or trade any security to, and/or with any person in the state of Michigan contrary to the provisions of this act. The provisions of this act shall be liberally construed to the end that the purposes thereof may be accomplished by preventing fraud, deception and imposition on purchasers of securities."

§ 451.106 Compiled Laws Michigan 1948, Volume 3, page 9209; § 19.746 Michigan Statutes Annotated, Volume 14, page 639. *Inapplicability of act; unnecessary to negative exemptions in process or pleadings, burden of proof.*

"It shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or any other writ or proceedings laid or brought under this act; and the burden of proof of any such exemption shall be upon the party claiming the same."

§ 451.107 Compiled Laws Michigan 1948, Volume 3, page 9209; § 19.747 Michigan Statutes Annotated, Volume 14, 1957 Cumulative Supplement, page 134. *Acceptance of securities for filing by commission, necessity; acceptance of a portion of a class of securities for filing.*

"No security shall be sold to or traded by any person within the state of Michigan unless and until the entire class of securities, of which such security is a part, shall have been accepted for filing for sale, issuance, or trading, by the commission, excepting as the security itself or the transaction therein is exempted by either section 4 or 5 of this act as the case may be, or the security itself has been accepted for filing without express or implied restriction as to trading by the commission prior to June 30, 1941: * * *".

§ 451.120 Compiled Laws Michigan 1948, Volume 3, page 9215; § 19.760 Michigan Statutes Annotated, Volume 14, page 649. *Unlawful sales; voidability, civil liability of seller.*

"Every sale or contract for sale of any security, not accepted for filing or otherwise exempt under this act or made contrary to any order of the commission, or made contrary to any provision of this act, shall be voidable at the election of the purchaser, * * *"

§ 451.133 Compiled Laws Michigan 1948, Volume 3, page 9220; § 19.773 Michigan Statutes Annotated, Volume 14, page 665. *Penalty.*

"Any person violating any of the provisions of this act shall be deemed guilty of a felony and upon conviction thereof, shall be punishable by a fine of not less than 100 dollars or more than 5,000 dollars, together with costs of prosecution, or by imprisonment in a county jail, state prison or other penal institution for not less than 30 days or more than 2 years, or by both such fine and imprisonment in the discretion of the court. * * *"

## Restraint of Trade Statutes

15 USC § 1. *Trusts, etc., in restraint of trade illegal; * * * penalty.*

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: * * *"

15 USC § 2. *Monopolizing trade * * * penalty.*

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"

15 USC § 15. *Suits by person injured; amount of recovery.*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *"

15 USC § 26. *Injunctive relief for private parties; exception.*

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *"

§ 445.701(5) Compiled Laws Michigan 1948, Volume 3, page 8945; § 28.31(5) Michigan Statutes Annotated, Volume 24, page 397. *Trust; definition, unlawfulness;* * * *.

"(5) It shall hereafter be unlawful for 2 or more persons, * * * or associations of persons, * * * to make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they shall bind or have bound themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they shall agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated fig-

ure, or by which they shall in any manner establish or settle the price of any article, commodity or transportation between them or themselves and others, so as to directly or indirectly preclude a free and unrestricted competition among themselves, or any purchasers or consumers, in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected. Every such trust as is defined herein is declared to be unlawful, against public policy and void: * * *"

§ 445.708 Compiled Laws Michigan 1948, Volume 3, page 8947; § 28.36 Michigan Statutes Annotated, Volume 24, page 403. *Contracts in violation of act; invalidity.*

"That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity."

§ 445.711 Compiled Laws Michigan 1948, Volume 3, page 8947; § 28.38 Michigan Statutes Annotated, Volume 24, page 404. *Civil Liability; double damages.* * * *.

"Sec. 11. In addition to the criminal and civil penalties herein provided, any person who shall be injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover two-fold the damages by him sustained, and the costs of suit. * * *"

§ 750.558 Compiled Laws Michigan 1948, Volume 4, page 14143; § 28.826 Michigan Statutes Annotated, Volume 25, page 241. *Trust and conspiracies in restraint of trade.*

(5) [The prohibitions are the same as in § 445.701 (5) C. L. Mich. 1948, page 171 ante].

* * *

"Any violation of the provisions of this section shall be and is hereby declared a conspiracy against trade, and any person who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates or furnish any information to assist in carrying out such purposes or orders thereunder or in pursuance thereof, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than 2 years or by a fine of not more than 1,000 dollars. Each day's violation of this provision shall constitute a separate offense."

**Restraints on Alienation**

§ 554.51(1) Compiled Laws Michigan 1948, Volume 5A, page 1338. *Rule against perpetuities; applicability; uniformity.*

"Sec. 1. The common law rule known as the rule against perpetuities now in force in this state as to personal property shall hereafter be applicable to real property and estates and other interests therein, * * * thereby making uniform the rule as to perpetuities applicable to real and personal property."

**Derivative Actions**

§ 641.3 Compiled Laws Michigan 1948, Volume 4, page 12841; § 27.2393 Michigan Statutes Annotated, Volume 23, page 25. *Jurisdiction of court over corporate officers.*

"Sec. 3. The circuit court in chancery within the proper county shall have jurisdiction over directors, managers, trustees, and other officers of corporations, * * *:

1. To compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge;

2. To decree and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such directors, managers, trustees, or other officers;

3. To suspend any such trustee or officer from exercising his office whenever it shall appear that he has abused his trust;

4. To remove any such trustee or officer from his office upon proof or conviction of gross misconduct;"

§ 641.5 Compiled Laws Michigan 1948, Volume 4, page 12842; § 27.2395 Michigan Statutes Annotated, Volume 23, page 33. *Same; exercise.*

"Sec. 5. The jurisdiction conferred in the third section of this chapter shall be exercised as in ordinary cases on bill or petition, * * * or at the instance of * * * any director, trustee, or other officer of such corporation having a general superintendence of its concerns, or by any stockholder of such corporation."

## Voting Trusts

§ 450.34 Compiled Laws Michigan 1948, Volume 3, page 9088; §21.34 Michigan Statutes Annotated, Volume 15, page 123.

"Sec. 34. *Voting trusts.* One or more shareholders may by agreement in writing deposit shares of the capital stock of any corporation, with or transfer shares of capital stock to any person or persons, * * *, for the purpose of vesting in such person, persons, * * * the right to vote thereon, or for such other lawful purposes

as may be agreed for any period of time determined by such agreement, not exceeding 10 years, upon terms and conditions stated in such agreement, pursuant to which such person, persons or corporations shall act."

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